Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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156 pp

QUESTIONS PRESENTED

Employees subject to pay-docking for reasons in 29 C.F.R. § 541.118(a), must be paid overtime wages. If an improper reduction was isolated, repaid, and future compliance is promised, an employer may avoid overtime liability. 29 C.F.R. § 541.118(a)(6) ("window of correction"). Fed.R.Civ.P. 54(d) defers to any statute with an express provision for costs. Costs and attorney's fees are mandatory to employees in FLSA actions. 29 U.S.C. § 216(b).

1. After *Auer v. Robbins,* 117 S.Ct. 905 (1997), is the "window" open to an employer who in multiple consecutive years prior to being sued, made repeated improper reductions to pay pursuant to an established written policy – a point as to which the courts of appeals are in conflict?

2. If an employees' FLSA lawsuit forces an employer to repay wages, change its impermissible policies, and promise future compliance with the FLSA, should the employees be required by Rule 54(d) to pay the employer's costs and be precluded from recovering their own attorneys' fees and costs under § 216(b)?

3. Is the "window" a valid Department of Labor regulation where, contrary to the FLSA, it ignores an employer's subjective intent and treats employers more favorably for actually (rather than just theoretically) violating FLSA regulations?

QUESTIONS PRESENTED – Continued

4. If a district judge expresses lack of impartiality, and despite objections adopts one party's twenty-three page proposed opinion verbatim, are the findings of fact in it entitled to deference; is reassignment on remand appropriate?

PARTIES TO THE PROCEEDINGS BELOW

The following present and former employees of the City of Hollywood, were Plaintiffs in the District Court, and Appellants before the United States Court of Appeals for the Eleventh Circuit:

> Donald K. Allen; Ernest W. Atkins; Hugh A. Bowen; *Russell Cormican; Bruce W. Davis; Robert S. Davis; Wesley R. Forestier; *Gilbert Frasier; George Geisler; Paul F. Glynn; Michael Ignasiak; Sylvester Jackson; *Earl Mitchell; *Ronald Pagano; Don E. Peoples; Bernice W. Rowe; Mike Rozos; William Shulby; James Walsh.

The Defendant and Appellee was the City of Hollywood, a municipal corporation of the State of Florida.

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* These individuals are not parties before this Court. They have chosen not to be included in this petition for writ of certiorari to the Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered August 29, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 120 F.3d 1178, and is reproduced in its entirety in the Appendix, pp. 1-7 (P.App. 1-7).

Neither the opinion of the United States District Court for the Southern District of Florida, nor its order taxing costs have been reported. They are reproduced in full. P.App. 18, 48.

JURISDICTION

The jurisdiction of the district court for the Southern District of Florida was invoked under 29 U.S.C. § 216(b) (Fair Labor Standards Act) and 28 U.S.C. § 1331 (general federal question jurisdiction). On May 2, 1995, the district court denied petitioners' motion for summary judgment and granted respondent's motions for summary judgment. P.App. 18.

The Eleventh Circuit on August 29, 1997 entered opinion and judgment affirming the decisions. P.App. 1. Petitioners timely filed a Suggestion for Rehearing En Banc[1] on September 19, 1997. It was denied in Order entered November 13, 1997. P.App. 50.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to 11th Cir.R. 35-6, a suggestion for rehearing en banc is treated as a petition for rehearing.

RELEVANT STATUTES AND REGULATIONS

29 U.S.C. § 213. Exemptions

(a) *Minimum wage and maximum hour requirements.* The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to –

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or * * *

29 U.S.C. § 216(b): *Damages; right of action; attorney's fees and costs; termination of right of action.*

Any employer who violates the provisions of section 6 or 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

29 C.F.R. § 541.5d: *Special provisions applicable to employees of public agencies.*

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from the exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without

pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because –

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[Effective Date: September 18, 1992. 57 Fed.Reg. 37,666 (August 19, 1992)]

29 C.F.R. § 541.118: Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences for a day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against

the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case.

Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis.

In such a case the exemption would not be applicable to him during the entire period when such deductions were being made.

On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also included a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in

which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work.

Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

STATEMENT OF THE CASE

The City of Hollywood (City) is a municipal corporation. It is required to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*

The City designates some of its employees "management". It exempts them from the mandatory overtime provisions of the FLSA, claiming they are its "executives, administrators, or professionals". There were one-hundred such employees from 1986 to 1994.[2]

Under City Rules applicable to them, management employees were subject to loss of wages for poor quality of work, for violating minor work rules, and for part day absences.

Prior to the filing of this lawsuit, management employees suffered *actual* losses of pay in 1992, 1991, 1990, 1989 (twice), 1988, 1987, 1986, 1983, and 1980. They

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[2] Although the City submitted no evidence to support this figure, it was the figure it asserted in its summary judgment papers and appellate brief.

were suspended without pay pursuant to the City's written rules governing quality of work, and discipline. P.App. 82-113.

Asserted reasons for docking their pay included, "excessive documentation on a minor issue", losing a radio, completing a form incorrectly, lack of confidence, failure to timely complete paperwork on a raise, appearing "confused and nervous", having an accident while view was obstructed, and making a racial comment to another employee. P.App. 82-113.

It was undisputed that in all cases, loss of wages occurred for reasons other than violations of major safety rules.

For the six years between April 1986 (when the FLSA became applicable in the public sector), and October 1992 (when the lawsuit against it was filed), eight out of the City's one hundred management employees lost wages due to pay-docking for violations of minor work rules and poor performance. P.App. 82-110. This was consistent with the City's practice prior to April 1986. P.App. 111-113.

The actual docking that occurred was generated by a "Report of Personnel Action" signed by authorized representatives of the City Manager's Office, Personnel Department, and department where the employee worked. R5-230-Ex. 2.1-2.11.

The City admitted, "The suspension of an exempt employee cannot take place without some City officials having knowledge of the suspension." R4-225-5. Indeed, the City Manager himself increased, from one week to two weeks, a suspension without pay that was imposed on a management employee for violation of "Rule V" (making an improper comment). P.App. 93.

There was evidence and testimony that prior to the filing of this lawsuit, and while suspensions without pay were actually taking place, the City was repeatedly placed on actual notice that such docking means employees are not "salaried" executives, and must therefore be paid overtime wages. City officials were warned

about, and given copies of, the decisions in *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991) (*APFU*), and *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990). R5-231-Ex. 4.11, pp. 30-32, 34, 38-41; R5-231-Ex. 4.10, pp. 12, 13, 15, 18; Ex. 4.8, pp. 27-28.

In July of 1992, Bruce Davis, a longtime employee of the City, wrote a letter to Mr. Mason, the City's Personnel Director. R5-231-Ex. 5.1. He likewise cited the decisions in *APFU* and *Abshire*. On behalf of himself and other management employees of the City, he formally requested that the City comply with the FLSA and pay overtime wages to himself and others because of the City's failure to comply with provisions of the Department of Labor's "salary basis test".

Three months prior to receipt of Mr. Davis' letter, Mr. Mason had himself signed and authorized in April 1992, a two-day suspension without pay for Mr. Lee, a management employee, for violating Rules E (vehicle usage); Q-3 and Q-7 (incompetence); S (use of city property); V (improper conduct); and W (miscellaneous)[3]; when Mr Lee allegedly parked his City vehicle in a handicapped parking space. P.App. 82-85.

He also authorized (and sometimes recommended), suspensions without pay for management employees in 1991, 1987, 1986 and 1983 for alleged violations of minor work rules, or poor quality of work. P.App. 86, 107, 110, 111.

In his August 1992 response to Mr. Davis' letter, the City's Human Resources Director, Mr. Keegan, referred Mr. Davis to a June 1992 memorandum opinion from a Texas district court regarding the window of correction. R5-231-Ex. 5.2. Long before he wrote this response, Mr.

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[3] The text of the City's employee Rules and Regulations and Safety Handbook are in the Record at R5-230-Ex. 1.1 to 1.3, 1.5; R6-248-Ex. 1.4. Verbatim reprints of documents citing reasons and specific rules as authority for suspension of management employees without pay, are in P.App. 82-113.

Keegan knew that suspending overtime-exempt employees without pay for violations of minor work rules, violates Department Of Labor (DOL) regulations, and knew about the DOL's window of correction. He also knew that decisions from the Eleventh Circuit are binding in Florida, while a district court decision from Texas is not. Mr. Keegan and Mr. Mason worked together prior to, and throughout this litigation.

When the City neither paid Mr. Davis and the others overtime pay, nor repaid monies it had improperly docked from management employees' pay, nor changed its policies on reductions to pay for discipline and part day absences, nor promised to comply in the future, plaintiffs were forced to file the instant lawsuit October 1, 1992. It was filed on behalf of Mr. Davis, another City employee, and others similarly situated. Nineteen present and former City employees subsequently opted in[4] pursuant to 29 U.S.C. § 216(b).

In its Answer, the City alleged plaintiffs were all executives, administrators, or professionals, and thus exempt under § 213(a)(1). It did not raise a "window of correction" defense.

In addition to loss of wages from bi-weekly pay checks because of alleged violations of minor work rules, plaintiffs lost money from their year-end pay checks. City officials testified management employees' year-end pay checks included pay for comp credits the City intended, and treated, as base wages.[5] The City required reductions

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[4] Two of the twenty-one plaintiffs voluntarily dismissed their claims before any decision by the district court on the merits, and were not appellants.

[5] The comp credit scheme was devised by the City because management employees' base wages were kept below the prevailing market rate.

for part day absences and other reasons,[6] from the comp credits management employees were required to work extra hours to earn. P.App. 22, 38; *see also* P.App. 111 (because radio assigned to employee was stolen, "you are hereby being suspended for twenty-four (24) hours with loss of pay. This suspension is to be served by the loss of twenty-four hours compensatory time.").

In September 1993 (a year after the lawsuit was filed), the City changed its policies. Management employees were no longer required to charge part day absences to accrued leave and comp credits, the comp credit scheme was eliminated with a corresponding increase to management employees' wages, and they were given increased vacation and other benefits. The City did not however, change its policy with respect to suspensions without pay.

In June 1994, the City repaid four management employees who lost wages as a result of suspensions without pay, and prohibited suspending management employees without pay for less than a week. The city, however, allowed management employees to be suspended without pay for periods of a week or more.

When briefs filed by Plaintiffs called into question the adequacy of these changes[7], in November 1994 the City repaid two additional management employees who had been docked for one and two weeks, and changed its policy again – this time prohibiting all suspensions without pay for management employees.

The City did not, however, reimburse wage losses that resulted from reductions for part day absences from

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[6] Salaried employees may be paid a guaranteed salary plus "extra" money, but neither salary nor "extra" may be subject to reductions based upon quality or quantity of work performed. 29 C.F.R. § 541.118(b).

[7] Employers would then simply suspend "exempt" employees for a week or more regardless of how inconsequential the alleged violation.

year-end monies intended as base wages.[8] The City did not repay this money even though the trial judge during oral argument on cross-motions for summary judgment stated: "That isn't comp time at all. Then they should be paid for it." R10-315-54.

In July 1994, the district court denied the City's January and May 1994 motions for summary judgment on the salary basis test because (a) the City had to "ultimately face and overcome the disciplinary pay deduction hurdle"; (b) there were questions of fact regarding whether exempt employees had actually been docked for part day absences. P.App. 8; 13, n. 2; 16 n.4.

Plaintiffs filed their motion for summary judgment September 1994 on the City's liability for: overtime wages for its failure to comply with the salary basis test because of its multiple recurring instances of docking management employees for minor infractions, quality of work, and part day absences; liquidated damages because of its failure to have a good faith reasonable basis for its docking rules and practices; and its willful violations under the standard in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988).

The City filed a cross-motion for summary judgment October 1994 based upon the window of correction and sought leave to amend to add it as a defense. The following month, it amended its motion for summary judgment to include two additional refunds it made in response to plaintiffs' challenge to its first round of corrections. In its fifth motion for summary judgment, it challenged the validity of the salary basis test as applied to the public sector, based on the decision in *SEIU v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994).

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[8] Reductions for part day absences were prohibited until the salary basis test was amended effective September 1992 for the public sector. The amendment affected only public sector employers who were prevented by law from paying for part day absences. 29 C.F.R. § 541.5d. The prohibition against docking for minor infractions was expressly unaffected by § 541.5d.

During oral argument, the judge announced that based on *SEIU*, he was holding the salary basis test invalid in its entirety as applied to the public sector. P.App. 30-31. As alternative grounds, he granted the City's motion on the window of correction.

He asked the City to prepare an order. The City submitted a twenty-three page opinion including findings of fact and conclusions of law. Employees filed detailed objections to the proposed order. The judge nevertheless signed the City's order in its entirety, without any change to it whatsoever. The City's Order reversed the court's July 1994 decision (not discussed at oral argument), and decided the comp credit issue contrary to the judge's comments during oral argument. P.App. 41.

On the issue of the City's willful violation of the FLSA under *Richland Shoe*, the opinion stated, "Surely, nothing could be more 'willful' than an explicit written policy", concluding even willful violations are excusable because under the window, "advertence" is irrelevant. P.App. 33, 34. It did not address Employees' argument that advertence in the window is not the same as willful as defined in *Richland Shoe*, because advertence means you intended to do what you did; willful means you knew it was wrong to do it.

Shortly thereafter, the court also denied plaintiffs' motion for summary judgment challenging the validity of the window of correction, holding *stare decisis* precluded consideration of the argument. P.App. 45.

A timely notice of appeal was filed. The City filed its motion for taxation of more than $15,000 in costs pursuant to Fed.R.Civ.P. 54(d). It sought recovery of costs, including costs of depositions it claimed "compelled" it to correct its wage and hour violations. The district court granted the City's motion and taxed costs against the employees for $9,817, holding, "Contrary to the position taken by the Plaintiff, 29 U.S.C. § 216(b) does not preclude awarding costs to a prevailing defendant." P.App. 48.

Employees' notice of appeal was amended to include the order with respect to costs. The appeals were consolidated. On appeal, Employees argued in part that the twenty-three page opinion written solely by the City did not conform to the court's rulings at oral argument, and misstated certain legal and factual issues. (Initial Brief at pp. 4-5, 48-55).

During the pendency of the appeal, the decision in *Auer* was issued. Both sides filed notices of reliance on it. Employees also filed and relied on excerpts from the Secretary of Labor's amicus brief that was accorded great deference in *Auer*, 117 S.Ct. 905, 911 (1997). Yet, in its August 29, 1997 opinion, the Eleventh Circuit merely directly quoted from the district court's findings of fact on the window of correction (the same facts prepared solely by the City and objected to by Employees). P.App. 3-4. It concluded that disposition on the grounds of the window of correction, rendered any discussion of the salary basis test, unnecessary. P.App. 5 n. 1.

On the issue of costs, the Eleventh Circuit agreed that § 216(b) does not preclude an award of costs to a prevailing employer. P.App. 6. It made no mention of Employees' argument, that they were the "prevailing party" for purposes of Fed.R.Civ.P. 54(d).

Employees filed a timely Suggestion for Rehearing En Banc. Among other issues, Employees argued that since the intervening decision in *Auer* upheld the validity of the salary basis regulation, they were entitled to their attorneys' fees and costs since they sued under a valid regulation (contrary to the judgment of the district court) and obtained relief for themselves and others similarly situated under it. Rehearing was denied November 13, 1997.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision Conflicts With Decisions Of This Court, Other Circuits, And The Secretary of Labor's Interpretation Of Its Own Regulation.

Employees must be paid overtime wages unless they are bona fide executives, administrators, or professionals as defined by the Secretary of Labor. 29 U.S.C. § 213(a)(1).

To qualify for this exemption, the employer has the burden of proving the employee was paid on a "salary basis" as defined in 29 C.F.R. § 541.118(a); and §§ 541.1, 541.2, 541.3. Thus, the employer must prove the employee was paid a predetermined salary that was not "subject to" reduction for variations in quality or quantity of work performed, or for partial day absences, or for violations of minor work rules. 29 C.F.R. § 541.118(a), and (a)(5).

The "window of correction" allows an employer to avoid liability for overtime wages if an improper reduction was isolated, repaid to the employee, and the employer promises to comply with the FLSA in the future. Then, the one-time violation may be corrected, and the exemption preserved, depending "upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6).

The Eleventh Circuit's vision of the window. The Eleventh Circuit has seized upon the "window of correction" to provide a limitless loophole for employers.

It allows an employer to avoid liability for overtime wages even if its prohibited policies were well-established, even if the employer engaged in an unmistakable pattern of impermissible reductions, even if the employee was *never* paid on a salary basis, and regardless of the employer's subjective intent when it violated the FLSA regulations. In other words, once the employer invokes the window in the Eleventh Circuit, the court is virtually precluded from conducting further inquiry.

This interpretation is at war with the well-established construction given the regulation by the agency charged

with enforcement of the FLSA, and at war with the intent and purposes of the FLSA itself. It is also out of step with other Circuits.

Its position on the matter becomes clear upon review of *Kuchinskas v. Broward County*, 840 F.Supp. 1548 (S.D. Fla. 1993), *aff'd*, 86 F.3d 1168, (11th Cir. 1996) (unpublished opinion at P.App. 52-56), *cert. denied*, 117 S.Ct. 1080 (1997), *reh'g denied*, 117 S.Ct. 1461 (1997). In *Kuchinskas*, the district court held that the window was available to avoid overtime liability even where FLSA violations were wide-spread, recurring, and pursuant to well-settled written policy.

In affirming, the Eleventh Circuit held the window would be applied even if employees had *never* been paid on a salary basis as required in the regulations:

> We need not decide the issue [whether employees were paid on a salary basis], however, because even if the affected employees were not paid on a "salary basis," the County can benefit from the so-called "window of correction" contained in the regulations: [Quoting last sentence of window]

P.App. 55. This was so, held the Eleventh Circuit, even where recurring improper deductions were pursuant to an express policy. All that mattered was the docking was not for lack of work.

This construction controlled the decision here. During the pendency of the appeal, both sides filed notices of supplemental reliance on *Auer*. The City relied on *Auer* for the proposition that it could correct its violations at any time even if its docking was advertent. Employees relied on *Auer* for the proposition that a court must *first* determine whether recurring docking was pursuant to settled policy, in which case the window would be inapplicable.

Months before the court rendered its decision here, Employees filed the Secretary's *Auer* amicus brief and cited the brief again in their petition for rehearing. Yet,

the opinion mentioned neither the analysis in *Auer*[9], nor the Secretary's brief to which this Court accorded great deference. *Auer*, 117 S.Ct. 905, 911 (1997).

Indeed, out of the many post-*Auer* decisions on the salary basis test and the window of correction, the Eleventh Circuit's opinion is the only one that deemed the *Auer* decision irrelevant except for its holding that if reductions are for lack of work, the employer does not have to also prove the improper reductions were inadvertent. P.App. 6 n. 2. *See, e.g., Ahern v. County of Nassau*, 118 F.3d 118 (2d Cir. 1997) (court bound to apply *Auer* because rendered during pendency of appeal).

Conflict with Supreme Court precedent. This "blind eye" conflicts with the decision in *Auer*, 117 S.Ct. 905 (1997).

While the Court in *Auer* ultimately held that Mr. Auer's employer could exercise the window of correction and avoid liability for overtime wages, it only did so after it *first* determined that Mr. Auer was an exempt employee who was never subject to improper reductions as a practical matter.

The Court reached this conclusion because it found the one-time incident of docking was made under "unique circumstances" (suspension without pay was part of a settlement agreed to in lieu of termination), and because *no other* similarly situated employee had ever been docked.

It is true that the Court in *Auer* did not explicitly state what the outcome would be if evidence showed improper reductions were multiple, actual, recurring, and pursuant to settled policy. It was not directly confronted with that factual situation. As the Secretary herself interprets *Auer*, the window would not be available in those circumstances. P.App. 57, 72. That *Auer*, should be construed this way is supported in the opinion.

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[9] Auer was mentioned only in a footnote, and only for the proposition that the window should be read disjunctively.

First, the Court affirmed the Eighth Circuit where, citing *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 613 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992), with approval, it agreed the window is not available for an employer who had a "settled policy of making improper deductions". *Auer*, 65 F.3d 702, 711 (8th Cir. 1995), *aff'd*, 117 S.Ct. 905 (1997). The Court did not disagree with this assessment.

Second, if the Court agreed with the reasoning of the Eleventh Circuit, it would simply have held in *Auer* (as did the Eleventh Circuit in *Kuchinskas*) that it was unnecessary to ever test whether Mr. Auer was "subject to" docking or salaried, because the window can be exercised at any time, for any reason, except lack of work. It would have dispensed with the lengthy "as a practical matter" analysis, and would not have bothered to hold that the exemption may be lost even without actual reductions.

Third, the Court virtually adopted the position of the Secretary of Labor in the amicus brief filed in *Auer*. The amicus brief made it quite clear that it is the Secretary's position (a position she has always held) that the window is not available to excuse recurring reductions made pursuant to well-settled policy.

Indeed, the Secretary believes interpretations of the window such as that endorsed by the Eleventh Circuit are in direct conflict with *Auer*. P.App. 57.

Conflict with other Circuits on window. The Eleventh Circuit not only conflicts with the Supreme Court decision in *Auer*, but also the Eighth Circuit decision in *Auer*. The Eighth Circuit stated the window is not available for an employer with a "settled policy of making improper deductions". *Auer*, 65 F.3d 702, 711 (8th Cir. 1995), *aff'd*, 117 S.Ct. 905 (1997). In contrast, the Eleventh Circuit believes it is irrelevant whether the impermissible practice was a settled one, as long as the reasons for docking were not lack of work.

The Eleventh Circuit conflicts with the Second Circuit as well. In *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 613

(2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992), the Secretary of Labor sued the employer despite the fact the employer had already corrected its policies and repaid wages it docked in violation of the regulations, despite the fact that only 24 out of 400 employees had actually been docked, and that the reasons for docking were other than for lack of work.

The Secretary's position was the window was not available because the recurring docking was the result of the employer's well-established written policies. The court agreed.

Similarly, the court in *Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), held the window is not available to an employer who "has a settled policy of making improper deductions from compensation." *See also Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) (citing *Auer* and stressing importance of employer's intention to pay on a salary basis before employer can avail itself of the window, court stated: "FLSA provides a 'window of corrections' defense to employers who unintentionally violate the salary basis test").[10]

Conflict with Secretary of Labor's interpretation of window which supports liability for overtime wages here. It has always been the Secretary's position that its window of correction is not available to excuse a settled policy or pattern of improper docking. *See Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (December 24, 1991) (impermissible disciplinary docking which occurs "on a regular and recurring basis (e.g., because of an employer's policy)" results in loss of exemption for all employees in class affected by such deductions).

Indeed, the Secretary of Labor recently filed her Brief as *Amicus Curiae* in *Klem v. County of Santa Clara*, (N.D.

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[10] But finding City's suspension of one employee in ten years was an unintentional failure to adhere to 541.118(a) and therefore the window was available.

Cal. November 12, 1997). P.App. 57. In it, the Secretary supported summary judgment for the employees because the window of correction was not available where over a six-year period, the employer had suspended 54 of the County's 5,230 exempt employees, without pay. P.App. 66, n. 1. In her conclusion, the Secretary states that the window is "simply not available to an employer that has made recurring deductions inconsistent with payment on a salary basis." P.App. 79.

It is the Secretary's position, "The 'window of correction' should not be read to allow an employer to retain the statutory exemption from paying overtime compensation, where that employer has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy." P.App. 66-67, 69-70. *See also* Amicus Brief of the United States in *Auer* at 15: "The window of correction is not open when an employer engages in a pattern of improper deductions."

Similarly, in the case at bar, the City likewise "clearly engaged in a pattern of improper disciplinary deductions pursuant to an established policy." P.App. 74 n. 6. The rules under which management employees were docked, were written, long-standing, and were cited and quoted in case after case. All docking was authorized by City officials. The docking continued uninterrupted, for at least six years prior to the filing of the lawsuit against it.

The City (and apparently the Eleventh Circuit) would seize upon only the absolute number of actual deductions, and hold that as a matter of law, eight instances of docking in six years (from April 1986 to September 1992 when it was sued), is insignificant and incapable of proving employees were "subject to docking as a practical matter." (The *Auer* test.) This is incorrect on a number of counts.

First, eight out of a possible 100 "exempt" employees is 8% over a six-year period. In the *Klem* brief, the Secretary effectively stated that reductions to only 1% (50 out of 5,000 employees) over a six-year period is, in her words, "clearly a pattern", and that those undisputed

facts clearly indicated the employees' pay was subject to reduction, thus making the window unavailable. P.App. 74 n. 6. Similarly, in *Malcolm Pirnie*, the Secretary sued because 6% of the pool of exempt employees were actually docked.

Indeed, in *Klem* the Secretary implicitly disapproved of *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), as having been decided without consideration of the Secretary's brief in *Auer*, and disapproved of *Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D. Ga. 1997), on the same grounds. P.App. 79.

She expressly approved of *Hoffman v. Sbarro*, No. 97 Civ. 4884 (SS), 1997 WL 666292, at *6 (S.D. N.Y. Oct. 23, 1997). In *Hoffman*, the court relied on *Auer* and the Secretary's *Auer* brief, and rejected the employer's argument that it was entitled to avail itself of the window regardless of what violations it may have committed, and "thereby bar plaintiffs' claims by preemptively reimbursing any potentially improper deductions." P.App. 78-79.

Second, the salary basis test is not a test of how many executives broke minor work rules. Rather, it is a test of whether they were subject to docking *if* they broke minor work rules. Indeed, actual reductions are not even necessary. *Auer*, 107 S.Ct. 905, 911 (1997)

Conflict With Supreme Court and Other Circuits regarding award of costs. The Eleventh Circuit's holding[11] that 29 U.S.C. § 216(b) does not preclude the award of costs to an employer under Fed.R.Civ.P. 54(d) conflicts in principle with *Friedman v. Ganassi*, 853 F.2d 207, 209-210 (3d Cir.), *cert. denied*, 488 U.S. 1042 (1988) (Rule 54(d) is expressly subordinate to any statute with "alternative standard" for awarding costs). Section 216(b) is a statute that does have an alternative standard for awarding costs – the award goes only from employers to employees.

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[11] *See also Matthews v. Allis-Chalmers*, 769 F.2d 215 (7th Cir. 1985), *overruled on other grounds*, 846 F.2d 457 (7th Cir. 1988).

It also conflicts in principle with *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir.), *cert. denied*, 513 U.S. 875 (1994) (plain language of § 216(b) precludes prevailing defendant from recovering its attorney's fees).

It conflicts with another panel's decision in *Kreager v. Solomon & Flanagan*, 775 F.2d 1541 (11th Cir. 1985) (in action for overtime wages, reversible error to award $571 in costs, plus attorneys' fees to the prevailing employer, without first finding bad faith and vexatious conduct by employee-plaintiff).

Most importantly, it conflicts with the Court's presumption in *Farrar v. Hobby*, 506 U.S. 103, 120 (1992), that a "pyrrhic victor" would be denied costs under Fed.R.Civ.P. 54(d). The City "won", only because it was forced to: (1) revamp its entire compensation plan for management employees; (2) repay wages it had illegally docked; (3) comply with federal wage and hour regulations; and (4) promise future compliance with them. Pyrrhic, indeed.

Conflict with common-sense, precedent, and intent of the remedial FLSA. Since a key objective of the FLSA is deterrence, an employer's violations may not be overlooked entirely. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

Moreover, an employer must *first* satisfy the conditions for exemption before partaking of the exemption's benefits. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392-393 (1960) (conditions for exemption "are explicit prerequisites to exemption, not merely suggested guideline"); *Moreau v. Klevenhagen*, 508 U.S. 22, n. 16 (1989) ("an exception to the general FLSA rule mandating overtime pay for overtime work" is a "benefit" of which a public sector employer is free to avail itself as long as it complies with all conditions for use of that benefit).

The Eleventh Circuit's vision of the window allows an employer to callously violate FLSA regulations while enjoying the benefit of the exemption – and allows it to do so with absolute impunity. Then, the employees have to repay the employer's costs.

II. The Decision Below Raises Important And Unresolved Problems With Far-reaching And Recurring Implications Nationwide.

Decision on costs severely cripples enforcement of FLSA, leads to absurd results, and is wholly at war with the FLSA. The FLSA affects virtually all employers and employees in both the public and private sectors. It is one of the most pervasive federal laws we have. Enforcement of its terms has enormous impact and importance to the public.

The Eleventh Circuit affirmed the district court's decision to tax costs against the very Employees whose lawsuit forced the City to repay wages it had illegally withheld, change its impermissible policies, and promise to comply with the FLSA in the future. Their lawsuit vindicated the public interest as well as benefited themselves and similarly situated employees. That they should now be penalized, for forcing compliance, is irreconcilable with the purpose and intent of the FLSA.

It guts the private attorneys general provision of the FLSA and severely undercuts enforcement of the statute. The FLSA is one of the very few federal statutes that *mandates* an award of attorneys' fees and costs, and mandates payment to one party, only. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 416-417 nn. 5, 6, 7 (1978) (contrasting FLSA's mandatory fee awards going only to plaintiffs, with other statutes that make awards permissive, but limited to certain parties, and with statutes which authorize fees to either party in a court's discretion).

It is a humanitarian and remedial statute intended to protect *employees*. 29 U.S.C. § 202(a). Section 216(b) is Congress' intent that employees have the right and ability to sue their employer in a private lawsuit to enforce compliance with the FLSA's minimum and overtime wage provisions.

This private attorneys general provision is even more critical because the Labor Department has repeatedly admitted that it is unable to enforce the FLSA by itself. It relies heavily on the ability of employees to obtain private representation to enforce the FLSA. *See Employees of the Department of Public Health v. Department of Public Health of Missouri*, 411 U.S. 279, 297 n. 12, 305 (1973) (J. Marshall, concurring in result) (unrealistic to expect Government enforcement of FLSA to be sufficient); (J. Brennan, dissent) (United States as *amicus curiae* stating employees would be left with a right without a remedy because the DOL has neither the resources nor the staff to investigate violations).

Significantly, the DOL's inability to police wage and hour violations has not improved. *See* Zachary, *Short-changed-Many Firms Refuse to Pay for Overtime, Employees Complain*, Wall St.J., June 24, 1996, at 1, col. 6, quoting Maria Echaveste, chief of the DOL's Wage and Hour Division, noting the number of investigators is down 15% from 1990 and acknowledging DOL not even able to ascertain the extent of violations nationwide.

The Eleventh Circuit's vision of a window of correction without limits, coupled with its decision that employees forcing FLSA compliance may be required to repay their employer's costs, and be precluded from recovering their own attorneys' fees and costs,[12] results in employees being foreclosed from suing for FLSA violations. This is entirely contrary to the intent and purpose of the FLSA and leads to a host of unacceptable and absurd results, including:

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[12] *See Arrington v. City of Macon*, 1998 U.S. Dist. LEXIS 809, *7 (M.D. Ga January 28, 1998), denying plaintiffs' motion for award of costs and attorneys fees after city used window.

1. The employee recovering wages her employer illegally withheld from her, will have to turn around and give those recovered wages – and more – back to the very same employer who was violating federal law.

2. In collective actions expressly authorized by § 216(b), plaintiffs will have to pay costs to their employer for recovering wages on behalf of similarly situated employees who elected not to opt-in to the lawsuit, so do not have to share the burden of paying those costs.

3. After it is sued for past and multiple violations, the employer is able to intentionally increase its costs of litigation in order to increase the burden on plaintiff-employees who had the audacity to sue.[13]

4. It gives employers everywhere every incentive to intentionally violate the FLSA because no employee would dare sue.

5. The violating employer is free to violate again with no fear of liability or lawsuit.[14]

Another anomalous result is the difference in treatment accorded employees under the civil rights statutes which allow fees to a "prevailing party". *See, e.g., Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1509, 1514, and 2 F.3d 1514, 1521 n. 2 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994) ("prevailing party" status to plaintiff who did not receive a judgment, but whose lawsuit caused the City to amend its ordinance and change the legal relationship between the parties which benefitted plaintiff).

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[13] For example, the City deposed all plaintiffs, filed five motions for summary judgment, and waited nearly two years before it corrected its violations.

[14] Indeed, in the case at bar, one has to question the sincerity of the City's "promise to comply in the future", given the fact it is demanding costs from the employees who rightfully, and were forced to sue it. Liability for costs unquestionably has a chilling effect on other employees.

Yet, the Eleventh Circuit treats employees under the FLSA far less favorably than those under 42 U.S.C. § 1988, even though the FLSA is mandatory and designed to favor and protect employees only to the express exclusion of their employer.

If the Court grants review here, Employees will show that based upon the plain language of both Fed.R.Civ.P. 54(d)(1) ("Except when express provision [for it] is made . . . in a statute . . . , costs . . . shall be allowed . . . to the prevailing party"), its Committee Notes, and the language of 29 U.S.C. § 216(b), a "prevailing" employer is not entitled to recover its costs unless the lawsuit was frivolous. Moreover, Congress expressly chose not to provide a remedy for a defendant-employer in the FLSA, and courts should not create one.

Auer has created confusion in courts and abuse by employers. Employers throughout the country are citing *Auer* to support their claims that they may engage in any number of pay reductions for reasons that openly violate the regulatory requirements for payment on a salary basis, and always avoid liability. *See* P.App. 70, for example. *See also Arrington v. City of Macon*, 973 F.Supp. 1467, 1474 (M.D. Ga. 1997); and the position taken by the City, that "the window of correction is an insurmountable barrier to [employees'] case". (Answer Brief pp. 32-33).

Because of the pervasive impact the FLSA has on all employers and employees in the country, it is imperative that the Court correct the erroneous impressions and abuses created by misinterpretations of *Auer*. There are many cases dealing with the salary basis test, the window, and costs currently pending in courts across the country. They would benefit greatly from the court's guidance.

Invalidity of window of correction. If the Eleventh Circuit is correct, and the only interpretation of the window is that employers are always allowed to exercise the window and avoid liability for overtime wages, regardless of the length, manner, and the employer's subjective intent, the window is invalid under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) and (C) as arbitrary, capricious, an abuse of discretion, not in accordance with law, and "short of statutory right".

It is invalid because it leads to the absurd results listed above. It also neglects consideration of the employer's subjective intent as a precondition for excusing or reducing liability. This conflicts with statutory provisions of the FLSA which require the employer plead and prove its good faith reasonable basis, and lack of willful violation,[15] before liability may be excused or reduced. *See* 29 U.S.C. §§ 255(a), 259, 260; also 29 C.F.R. § 578.3(c).

Indeed, the Court in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989) struck down a Department of Labor interpretive regulation as invalid because it ignored the subjective element (intent) that was contained in the age discrimination statute, and allowed employers to avoid liability if they merely met an objective test (cost-justification). In the same way, the window allows employers to avoid liability for all reasons except lack of work, regardless of whether its violations were willful or lacking in good faith.

In addition, the window actually *encourages* noncompliance with the salary basis test. If an employer actually (even willfully) reduces pay for reasons prohibited in the regulations, it is *guaranteed* that there will be no liability for overtime wages. On the other hand, an employer that

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[15] Under *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988), violations are willful if the employer either knew or was in reckless disregard for the matter of whether its conduct violated the FLSA.

"effectively communicates" that reductions will be taken, may be found liable for overtime wages which cannot be avoided because it has no actual reductions to reimburse. *See* P.App. 71, 74, 75 n. 8 (Secretary acknowledging such interpretations of the window render the salary basis test "virtually meaningless", and a "nullity").

As a matter of public policy, attorney's fees and costs to employees forcing FLSA compliance, is of paramount necessity. The Eleventh Circuit's decision on Employees' costs and attorneys fees, results from a basic misconception about the window. An employer using the window *admits* violations.

In their petition for rehearing, Employees asked that if the court adhered to its decision on the window of correction, the case be remanded so Employees could receive a partial judgment in their favor based upon the City's *admitted* violations of the salary basis test, and consequently receive their own attorneys' fees and costs.[16] This argument was based upon the intervening decision in *Auer* upholding the validity of the salary basis test as applied in the public sector.

After all, an employer is precluded from denying an employee payment for overtime hours, while also making the employee subject to reductions to his salary. If the employer does both, it has done something wrong. Either there was enough of a pattern of docking to lose the exemption, so the employer must pay overtime wages, *or*, there was not enough of a pattern to lose the exemption, but the employer must repay the wages it illegally withheld. Either way, the employees who brought the suit, were right, the employer was wrong, and the employees

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[16] Prior to *Auer*, Employees could not have filed a motion for attorneys' fees and costs under § 216(b), because the trial court held that the regulation under which they sued was invalid in its entirety. Accordingly, they could not receive any kind of judgment in their favor. They did however, request attorneys' fees and costs in their Complaint. P.App. 2.

should be entitled to a judgment in their favor so they may seek their attorneys' fees and costs under § 216(b).

Deference should not be accorded to courts' findings of fact if they result from verbatim adoption of only one party's draft of court's opinion; propriety of reassignment on remand for lack of impartiality. If the Court grants review and remands for further proceedings at the district court level, Employees will ask that the Court instruct that it be reassigned on remand because of the trial judge's appearance of lack of impartiality. *See Offutt v. United States*, 348 U.S. 11 (1954) (remanded with instructions to reassign to different district judge because trial judge "failed to represent the impersonal authority of the law."); *Anderson v. Bessemer City*, 470 U.S. 564, 572-573 (1983) (criticizing trial judge's wholesale verbatim adoption of one party's findings).

The district judge gave the appearance of lack of impartiality, and expressed numerous comments at oral argument aligning himself with the City, with taxpayers, and with an electorate that "wanted less government", R10-315-4, 6, 17, 19, 20, 43-44, 58, 59, 65, 67.

The Eleventh Circuit erred by according deference to the trial court's findings, and Employees ask that when considering this petition and the underlying opinions of both the district court and the Eleventh Circuit, that the Court view the findings of facts and conclusions of law with caution, and not with the great deference normally accorded findings and conclusions prepared by a court. *See Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1198 n. 2 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (practice of verbatim adoption of facts and conclusions by one party explained trial court's misinterpretation of the evidence and law); *In re Colony Square*, 819 F.2d 272, 274-275 nn. 6, 7, 9-11 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (quality of judicial decisionmaking suffers when judge delegates drafting order to one party).

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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February 11, 1998

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Bruce W. DAVIS, Mike Rozos, on behalf of themselves and all other present and former employees similarly situated, et al., Plaintiffs-Appellants,

Herbert Chernov, et al., Plaintiffs,

v.

CITY OF HOLLYWOOD, a municipal corporation of the State of Florida, Defendant-Appellee.

Bruce W. Davis, Mike Rozos, on behalf of themselves and all other present and former employees similarly situated, Plaintiffs-Appellants,

Bernice W. Rowe, Herbert Chernov, Ernest W. Atkins, William Shulby, et al., Plaintiffs,

v.

City of Hollywood, a municipal corporation of the State of Florida, Defendant-Appellee.

Nos. 95-5304, 95-5536.

United States Court of Appeals, Eleventh Circuit.

Aug. 29, 1997.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT, Chief Judge, COX, Circuit Judge, and MESKILL*, Senior Circuit Judge.

HATCHETT, Chief Judge:

In this action based on the Fair Labor Standards Act, we affirm the district court's ruling that the appellee avoided liability through the exercise of the "window of correction."

BACKGROUND

On October 1, 1992, appellants, nineteen present and former management employees of appellee City of Hollywood (the City), filed this lawsuit pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, in the Southern District of Florida. Appellants alleged that the City willfully failed to pay them overtime as required under section 207(a)(1), which provides that covered employers must compensate their employees at a rate of at least time and one-half for all hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1) (1994). Appellants sought unpaid overtime compensation, liquidated damages, attorneys' fees and costs.

The FLSA exempts from section 207(a)(1) any employee employed in a bona fide executive, administrative or professional capacity who receives payment on a salary basis. *See* 29 U.S.C. § 213(a)(1) (1994); 29 C.F.R. §§ 541.1-.3 (1995); *see also Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir.1994). An employee is considered

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* Honorable Thomas J. Meskill, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

paid "on a salary basis" if he or she "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his [or her] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a) (1995). Thus, to claim exemption from the FLSA's overtime pay requirements pursuant to section 213(a)(1), an employer must prove that the relevant employees meet two tests: the job duties test and the salary basis test. Appellants alleged in their complaint that they did not fall within this exemption because, among other things, (1) "their pay [was] subject to reductions for absences of part of a day"; and (2) the City "reduce[d] their accrued leave in hourly increments for partial day absences."

Upon appellants' motion, the district court bifurcated this lawsuit, deciding to consider first the salary basis test issues. On May 2, 1995, in addressing appellants' motion for summary judgment and the City's partial motions for summary judgment on the salary basis test, the district court made the following findings of fact:

> The plaintiffs concede that they have no evidence of actual pay docking for absences of less than a day since April 1986, the date when the mandate of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) became applicable to the public sector. The plaintiffs also concede that they are unaware of any disciplinary suspensions discovered during the course of the litigation which have not been reimbursed by the City's exercise of the so-called window of correction. 29 C.F.R. § 541.118(a)(6). Plaintiffs could

> produce no other evidence relating to the actual docking of salaries of the City's management employees from 1986 through the present.
>
> . . . .
>
> There are a total of six disciplinary suspensions from 1986 through the present. Two of these suspensions were for periods of one and two weeks, respectively. The other four suspensions were for periods of less than one week. During the pendency of this lawsuit, the City conducted an audit of the personnel files of all management employees from 1986 through 1994. During the course of the audit, the City became aware of the four suspensions for periods of less than a week, which had not previously been revealed in discovery. Subsequent to the audit, the City reimbursed these four employees. Shortly thereafter, the City also reimbursed the two employees who had been suspended for periods of one and two weeks, respectively. Only one of the suspended employees (the one receiving a one-week suspension) is a plaintiff in this case. The City also adopted a written policy prohibiting unpaid suspensions of any kind for all management employees.

The district court granted summary judgment to the City on the salary basis test, holding in relevant part that the City "properly exercised the window of correction to avoid any liability which might have arisen from 'improper' disciplinary suspensions." Thereafter, appellants stipulated to waiver of the job duties test issues and moved for final judgment, which the district court entered on September 21, 1995. On November 30, 1995, the district court granted the City's motion for taxation of

costs pursuant to Federal Rule of Civil Procedure 54(d), awarding the City $9,817.11. This appeal followed.

DISCUSSION

Appellants assert two claims of error that we discuss.[1] First, they argue that the district court erred in holding that the City properly availed itself of the "window of correction" set forth in the Department of Labor's regulations. We disagree and uphold the determination of the district court.

The window of correction provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. § 541.118(a)(6) (1995). In this case, the City made deductions for disciplinary suspensions, not for lack of work, and subsequently reimbursed the affected employees and adopted a written policy proscribing unpaid suspensions. In our view, no question exists that under the facts of this case the City comes within the protection of the window of correction and thus does not lose the section 213(a)(1)

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[1] Given our disposition of this appeal, we do not address the appellants' contentions concerning (1) the district court's application of *SEIU, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir.1994), *superseded*, 60 F.3d 1346 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 774, 133 L.Ed.2d 726 (1996), to this case, and (2) the propriety of reassignment on remand.

exemption. Appellants' arguments to the contrary are without force.[2]

Next, appellants contend that the district court erred in awarding costs to the City pursuant to Federal Rule of Civil Procedure 54(d)(1), which reads: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . " Fed.R.Civ.P. 54(d)(1). Appellants argue that contrary to the district court's holding, section 216(b) of the FLSA controls and precludes an award of costs to the City. That section provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (1994). We agree with the district court's conclusion that section 216(b) does not constitute an "express provision" precluding an award of costs to a prevailing defendant. *See Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1219 (7th Cir.1985) (section 216(b) "merely details the remedies available to prevailing plaintiffs, without addressing the

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[2] One of the arguments appellants press is that this court erred in holding that the window of correction must be read disjunctively. *See Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir.1994). We note that the Supreme Court recently embraced this court's view. *See Auer v. Robbins*, ___ U.S. ___, ___, 117 S.Ct. 905, 912, 137 L.Ed.2d 79 (1997) ("[T]he plain language of the regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective action.") (second alteration and emphasis in original).

award of costs available to successful defendants"), *overruled on other grounds by Oxman v. WLS-TV,* 846 F.2d 448 (7th Cir.1988). Accordingly, we affirm the district court's award of costs to the City.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS, MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiff,

vs.

THE CITY OF HOLLYWOOD, etc.,

Defendant.

_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(Filed July 15, 1994)

THIS CAUSE came before the court upon Defendant's two separately filed Motions for Summary Judgment. Plaintiffs have responded in opposition.

I. Background and Statutory Overview

This is an action instituted by present and former employees of the City of Hollywood (the "City") pursuant to the Federal Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA"). Plaintiffs claim they should have received overtime pay as required under §207(a)(1), which provides that employees working in excess of forty-hours per week must be compensated at a rate of at least time and one-half for the excess hours worked.

The City's position is that the overtime pay requirements of §207(a)(1) does not apply to Plaintiffs because they are management/executive employees who are exempt pursuant to §213(a)(1). Section 213(a)(1) exempts employees in a "bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]". 29 U.S.C. §213(a)(1).

Under these Department of Labor ("DOL") regulations, the exemption is available to the City only if Plaintiffs' jobs satisfy two requirements: (1) their duties must be of a certain type, which shows that the employee is in an executive, administrative or professional capacity, and (2) they must be paid "on a salary basis". See 29 C.F.R §§ 541.1-541.3. An employee is "on a salary basis" if under his employment agreement,

> he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a).

In the complaint, Plaintiffs allege, among other things, that their salary was subject to reduction for absences of less than a day, and that the City's policy was to reduce Plaintiffs' accrued leave in hourly increments for these absences. The implication of these allegations is that because of the City's actions and policies, the Plaintiffs cannot be considered exempt employees. If Plaintiffs are determined to be non-exempt employees, they must be paid for overtime worked.

On January 30, 1994 the City filed a Motion for Summary Judgment (the "First Motion"), arguing that in the Eleventh Circuit, a Plaintiff must suffer actual pay deductions in order for the Court to determine that the Plaintiffs' salary is "subject to reduction", and thus non-salaried and consequently non-exempt. The City argues that no Plaintiffs salary was actually deducted for absence of less than a day, and seeks summary judgment either broadly (i.e., that the Plaintiffs are exempt employees), or narrowly (i.e., that because no actual pay deduction had occurred, Plaintiffs' salary was not "subject to reduction").

On May 11, 1994 the City filed a second Motion for Summary Judgment (the "Second Motion"), arguing that the City's practice of reducing Plaintiffs' accrued leave in hourly increments for partial-day absences does not affect the exempt status of Plaintiffs.

II. Standard for Summary Judgment

Fed. R. Civ. P. 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48. (1986) ("*some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The party opposing the summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some

evidence showing that material facts are in issue. *Id.* at 256. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial."); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Eleventh Circuit has recently restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

III. Discussion

As for the City's First Motion, the City half-acknowledges that this Court cannot grant summary judgment on the larger issue of Plaintiffs' exempt status at this time. As noted above, in order for the § 213(a) exemption to apply, Plaintiffs' jobs must satisfy both the duties and salary prongs of the two-part test. The City's failure as to

either prong will defeat the summary judgment motion on the issue of exempt status.

Most of the City's arguments in the Motion address the salary prong. Addressing the duties prong for the first time in its reply to Plaintiffs' response against the First Motion, The City halfheartedly attempts to show that the duties test is satisfied by presenting an affidavit of William Keegan, the Personnel Director of the City. This affidavit is entirely insufficient to meet the City's initial burden on a summary judgment motion. In this affidavit, Keegan merely makes a self-serving declaration that all the Plaintiffs "performed supervisory or administrative duties in their respective positions" without giving any factual basis for this legal conclusion. Whether particular duties are administrative or managerial is governed by the DOL regulations. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). The City has provided no facts about the job duties of Plaintiffs that would lead this Court to conclude as a matter of law that the duties test has been met; therefore the Court cannot grant summary judgment on the larger question of Plaintiffs' exempt status.

In the alternative, the City moves for partial summary judgment on the salary prong of the two-part test. The City argues that the law of the Eleventh Circuit is that actual, not theoretical deductions must exist in order to invalidate the status of otherwise exempt management employees. *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991). Because there has been no actual deduction of pay of any Plaintiff, so the City argues, partial summary judgment should be granted in favor of the City on the salary prong.

The Court finds that partial summary judgment must be denied because there is a genuine issue of material fact as to the relevant inquiry, of whether any Plaintiff's pay was in fact deducted for partial day absences.[1] According to the answer to Interrogatory No. 3(c) by Plaintiff Bernice Rowe (Exhibit L to McDermott Affidavit), Plaintiff Rowe's pay was in fact deducted for a partial day absence. The City argues that this evidence is inconclusive as to whether Plaintiff Rowe's pay was indeed docked during the time the FLSA was applicable to the City, and that there is no documentation for this factual claim. This is precisely the kind of factual dispute that shows that genuine issues of material fact exist.[2] As the Eleventh Circuit stated in *Clark*, supra, "it is never enough simply to state that the non-moving party cannot meet its burden at trial."

Having determined that summary judgment is inappropriate on the over-arching issue of Plaintiffs' exempt status and the sub-issue of the salary test, the Court next turns to the still narrower sub-issues on which the City requests rulings in the two Motions. To wit, the City

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[1] Plaintiffs argue that the correct standard is not actual deduction, but something less than that. For reasons set forth below, the Court agrees with the City that actual reduction of salary must be shown under Eleventh Circuit law.

[2] The City argues that even if there is a genuine issue of material fact as to whether Plaintiff Rowe's pay was actually deducted, summary judgment on this question must be granted as to all the other Plaintiffs in this case. For reasons set forth below, the Court finds that actual deduction of Plaintiff Rowe's pay makes all similarly situated Plaintiffs' pay "subject to reduction" under the DOL regulations.

requests rulings on two specific points of law: (1) whether the "subject to reduction" language of the regulations requires actual deductions of pay; and (2) whether the policy of leave docking affects an employee's exempt status.

The City evidently wants a ruling on these questions, even though they are not dispositive of the case, to "narrow" the issues before commencement of trial. The Court finds that resolution of the first question may indeed help to narrow the issue for trial, but the second question is so contingent on the resolution of other factual and legal issues that it would be appropriate to defer on the issue.

The first question on which the City requests a ruling is whether the "subject to reduction" language of the regulations requires actual deductions of pay. The City argues that according to *Atlantic Firefighters*, supra, the law of the Eleventh Circuit is that actual deductions are necessary. Plaintiffs argue that the *Atlantic Firefighters* decision is inapposite, and moreover, is contrary to the majority of other courts that have addressed the issue.

In *Atlantic Firefighters*, the Atlanta Professional Firefighters Union, Local 134 sued the City of Atlanta for nonpayment of overtime worked by its firefighters, lieutenants and captains. In relevant part, the City of Atlanta argued that the captains were exempt administrative employees under § 213(a)(1). The Union argued that because a city ordinance requires that all city employees' compensation be decreased for arriving late or for other violations of regulations, the captains cannot be exempt employees. The Eleventh Circuit concluded in a brief passage that

> the Union presented no evidence to prove that any captain ever suffered a reduction in pay for any of the reasons stated. Accordingly, we conclude that the City has demonstrated that a captain's pay is not subject to reduction because of the quality or quantity of work.

Atlanta Firefighters at 805.

It is true that the holding in *Atlanta Firefighters* is rather summary in nature, and lacks analysis of its and other courts' decisions. But it is a clear and unambiguous holding; one which this Court is not free to disregard in favor of the law of other circuits. The Eleventh Circuit law, as stated in *Atlanta Firefighters*, is that when there is no evidence of any actual salary reduction, the employer has demonstrated that an employee's pay is not "subject to reduction" within the meaning of the DOL regulations.

The Court notes, however, that the *Atlanta Firefighters* decision does not hold, as the City suggests, that *each* employee must demonstrate that his own pay was actually deducted. In fact, recently in *Avery v. City of Talladega*, 1994 U.S. App. LEXIS 16545 (11th Cir. July 5, 1994) the Eleventh Circuit explicitly rejected such a reading of *Atlanta Firefighters*,[3] and held that when one employee's salary is destroyed, other similarly situated employees' salaried status is destroyed as well. *Avery*, in part, involved the salaried status of a police lieutenant who

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[3] "In [*Atlanta Firefighters*] we held that Atlanta's fire captains were salaried notwithstanding the theoretical possibility of pay deductions not permitted under section 541.118, but we did not hold that an actual deduction invalidates the salaried status of only the employee so penalized." *Avery* at 10, citations omitted.

was suspended for infractions of safety rules that the court found were not "of major significance." Finding that one lieutenant was thus suspended, the Eleventh Circuit held that the remaining lieutenants' salaried status was consequently affected. Therefore, in the Eleventh Circuit, actual reduction of at least one employee's salary is first necessary, but then sufficient, to show that similarly situated employees' salaries are "subject to reduction".

The second question on which the City requests ruling is whether the policy of leave docking affects the outcome of the salary test. The Court defers ruling on this question because it not [sic] a dispositive issue, apparently has no settled binding law, and becomes relevant only upon failure of Plaintiffs to prove that their actual pay was reduced (for partial day absences or as a disciplinary measure[4]). It does not appear that the purpose of summary judgment, of judicial economy, is appreciably furthered to decide this contingent issue now.

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[4] The City argues that because the complaint contains no allegations of suspensions without pay as a disciplinary measure, Plaintiff may not now attempt to prove such actions took place and show that the City fails the salary test. Even if the Court were to read the complaint so narrowly, an amended complaint would quickly cure the problem. The City must therefore ultimately face and overcome the disciplinary pay deduction hurdle in order to prevail on the issue of Plaintiffs' exempt status.

Conclusion

THE COURT has considered the Motions and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment, filed on January 31, 1994 be DENIED. Defendant's Motion for Partial Summary Judgment, filed on May 11, 1994 is hereby DEFERRED until the Court deems it necessary or advisable to resolve the Motion.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 15 day of July, 1994.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

copies provided:

All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS,
MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs,

vs.

THE CITY OF HOLLYWOOD, a municipal corporation of the State of Florida,

Defendants.
_____/

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF CITY ON "SALARY BASIS" TEST

(Filed May 2, 1995)

THIS CAUSE came before this Court upon the plaintiffs' motion for summary judgment, the City's motion for partial summary judgment on window of correction, and the City's motion for partial summary judgment on the salary basis test. The Court previously entered an order on the City's motions for summary judgment on July 15, 1994 in which the Court deferred ruling on certain matters and found questions of fact to exist as to others. Substantial memoranda, affidavits, and evidence have been submitted by all parties with regard to these motions. On March 2, 1995, the Court entertained oral argument on all pending motions.

Based upon the documents and evidence submitted, as well as the stipulations of counsel at oral argument, the Court no longer finds that genuine issues of fact

preclude summary judgment. The Court further finds that it is no longer necessary to defer rulings on matters upon which the Court previously chose to defer.

I. Background and Statutory Overview

This is an action instituted by 19 present and former employees of the City of Hollywood ("City') pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Plaintiffs seek overtime pay, liquidated damages and attorneys' fees alleging that the City has failed to pay them at the rate of time and a half for hours they have worked over forty in a work week. The plaintiffs allege in their complaint that they were subject to reductions for absences of less than a day and that it was the City's policy to reduce plaintiffs' accrued leave in hourly increments for such absences.

The City's position is that the overtime pay requirements of § 207(a)(1) of the FLSA do not apply to the plaintiffs because they are employees who are exempt from such requirements pursuant to § 213(a)(1). Under the Department of Labor ("DOL") regulations, the exemption is only available to the City if the City satisfies two requirements: (1) the City must show that the duties of each plaintiff qualify him/her as an executive, administrative or professional as provided by the regulations and caselaw,[1] and (2) the City must show that the plaintiffs were paid "on a salary basis." An employee is paid

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[1] For ease of reference, the Court will refer to individuals whom the City claims are exempt under § 213(a)(1) as "management employees."

"on a salary basis" if under his/her employment agreement

> he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). The pending motions and this order relate only to the "salary basis test." Notwithstanding this order, the City must still demonstrate that the duties of each plaintiff are sufficient to satisfy the so-called "duties test" of § 213(a)(1).

II. Standard for Summary Judgment

Fed. R. Civ. P. 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Id.* at 256. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or

by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial."); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Eleventh Circuit has recently restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Furthermore, the *Clark* Court stated, "it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Id.*

III. Relevant Facts

In its review of the materials submitted by all parties in support of the pending motions and during the course of the oral argument before the Court, the undisputed facts relevant to the determination of the pending motions have emerged. The plaintiffs concede that they have no evidence of actual pay docking for absences of less than a day since April 1986, the date when the mandate of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985) became

applicable to the public sector. The plaintiffs also concede that they are unaware of any disciplinary suspensions discovered during the course of the litigation which have not been reimbursed by the City's exercise of the so-called window of correction. 29 C.F.R. § 541.118(a)(6). Plaintiffs could produce no other evidence relating to the actual docking of salaries of the City's management employees from 1986 through the present.

Prior to October 1993, the City had a compensation-time system for its management employees pursuant to which management employees could receive compensation time credit ("comp time") for hours which they worked in excess of forty in a work week. The City at times made deductions from the plaintiffs' accrued leave banks, including comp time, for absences of less than one day. Each plaintiff received a predetermined salary even though each plaintiff could obtain additional compensation by "cashing out" leave time at the end of the year or upon termination. Management employees were permitted to use comp time to take vacations and then "cash out" their vacation time at the end of the year. Aside from the reimbursed disciplinary suspensions addressed by the City's exercise of the window of correction, the plaintiffs could produce no indication that the City ever reduced the management employees' fixed salaries. The only evidence the plaintiffs produced was that leave banks, including comp time, were sometimes reduced or eliminated by the City.

There are a total of six disciplinary suspensions from 1986 through the present. Two of these suspensions were for periods of one and two weeks, respectively. The other four suspensions were for periods of less than one week.

During the pendency of this lawsuit, the City conducted an audit of the personnel files of all management employees from 1986 through 1994. During the course of the audit, the City became aware of the four suspensions for periods of less than a week, which had not previously been revealed in discovery. Subsequent to the audit, the City reimbursed these four employees. Shortly thereafter, the City also reimbursed the two employees who had been suspended for periods of one and two weeks, respectively. Only one of the suspended employees (the one receiving a one-week suspension) is a plaintiff in this case. The City also adopted a written policy prohibiting unpaid suspensions of any kind for all management employees.

There is no factual dispute with regard to the City's attempts to reimburse all employees who were suspended for disciplinary reasons, nor is there a factual dispute with regard to the City's written policy prohibiting future suspensions of all management employees.

IV. Discussion

A. VALIDITY OF THE SALARY BASIS TEST IN THE PUBLIC SECTOR PRIOR TO SEPTEMBER 6, 1991

Under the FLSA, employees are generally paid overtime compensation for hours worked in excess of forty hours in a given workweek. 29 U.S.C. § 207(a)(1). Notwithstanding this general requirement, certain employees are exempt from the overtime requirements of the FLSA if

they are employed in a bona fide executive, administrative or professional capacity. 29 U.S.C. § 213(a)(1). In 1974, Congress extended coverage under the FLSA to encompass public sector employees who had previously not been subject to the overtime requirements of § 207(a)(1). Fair Labor Standards Amendments of 1974, P. L. No. 93-259, § 6, 88 Stat. 55, 59-63. While these amendments were briefly declared to be unconstitutional in *National League of Cities v. Usery*, 428 U.S. 833 (1975), the U.S. Supreme Court overruled *Usery* in *Garcia, supra*, thereby re-validating the FLSA's application in the public sector. There is no indication in the Court's decision in *Garcia* that any statutory provision of the FLSA was excepted from application to the public sector. *Id.* The mandate in *Garcia* became effective on April 15, 1986. Fair Labor Standards Amendments of 1985, P.L. 99-150, Sen. Rep. No. 99-159, p. 4.

By virtue of this extension of the FLSA to public sector employees, it appears clear that Congress also intended public sector employers to be able to avail themselves of the exemptions provided by section § 213(a)(1). H.R. Rep. No. 913, 93rd Cong. 2d Sess. (1974) (provisions of FLSA are extended to "non-supervisory" employees in the public sector). This conclusion is also supported by the DOL's own interpretation of the FLSA:

> [I]t is clear from a plain reading of FLSA's legislative history in 1974 . . . that Congress intended for the section 13(a)(1) exemption to be available for public sector employees.

57 Fed. Reg. 37,672 (1992). The plaintiffs before the Court do not dispute that the City is entitled to claim the

statutory exemptions provided by § 213(a)(1) for qualified employees.

On October 5, 1994, the Ninth Circuit Court of Appeals in *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 493 (9th Cir. 1994) ("*SEIU*"), concluded that the DOL's salary basis test, as it existed prior to its modification on September 6, 1991, was inconsistent with Congress' clear intent that the § 213(a)(1) exemptions should apply within the public sector, and invalidated the pre-1991 salary basis test in its entirety as applied to the public sector. This Court has carefully considered the reasoning of the Ninth Circuit in *SEIU* and finds it to be sound.[2]

It appears clear that when Congress extended the wage and overtime protections of the FLSA to public sector employees, it also extended the exemption protections of the act to public sector employers. The Court is

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[2] The Court further finds, based upon its careful review of existing precedent, that the Eleventh Circuit has not been presented with the opportunity to consider the pre-1991 validity of the salary basis test. Despite plaintiffs' suggestions to the contrary, the Eleventh Circuit was not asked to address this issue in its decisions in *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994); *Lee v. Flightsafety Service Corp.*, 20 F.3d 428 (11th Cir. 1994); or *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991). With the exception of one district court decision from the Middle District of Georgia – *Arrington v. City of Macon*, 2 WH Cas.2d (BNA) 607 (M.D. Ga. 1994) – the court is unaware of any other case in which the validity of the pre-1991 salary basis test has been questioned. The Court finds the reasoning in *Arrington* to be less persuasive than the Ninth Circuit's analysis in *SEIU* and not binding upon the Court.

unaware of any case law which has concluded that the § 213(a)(1) exemptions are unavailable to state and local government employers. The Court similarly finds no indication in the DOL's history of FLSA interpretation since *Garcia* which would lead the Court to conclude that employers such as the City are not entitled to claim that their "bona fide executive, administrative and professional" employees are outside the scope of the FLSA. Given this clear Congressional intent, the Court, as the final authority on issues of statutory construction, must reject administrative constructions which are contrary to Congress' intent. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984); *see also, FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978). As the *Chevron* Court succinctly noted:

> If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843, n. 9.

Even if the intent of Congress were less than perfectly clear, which the Court believes is not the case in this instance, a determination would still have to be made to determine whether the DOL's construction is "permissible" in light of the overall purpose of the act in question. *Chevron*, 467 U.S. at 843. The Court finds, as did the Ninth Circuit in *SEIU*, that the DOL's salary basis test, prior to its modification on September 6, 1991, was (1) contrary to Congress' intent; and (2) an impermissible interpretation

of the § 213(a)(1) exemptions, since it effectively precluded public sector employers from invoking those exemptions for any of its employees.

When the DOL adopted the current version of the salary basis test[3] in 1954, the FLSA did not apply to public sector employers. In fact, it did not come to apply to the public sector until thirty-two years later, when *Garcia* reinstated the 1974 amendments to the FLSA. It would have been extremely difficult, if not impossible, to anticipate the impact the 1954 salary basis test would have on governmental pay practices thirty to forty years later. The DOL recognized the "dated" nature of the 1954 salary basis test when it amended the test in 1991 and stated as follows:

> In light of public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended the FLSA coverage to state and local governments simply *could not operate in a manner that effectively distinguished exempt from non-exempt public employees.* The regulations were thus out of harmony *with the intent of the statute* because state and local governments could not practically avail themselves of the exemption intended by Congress, and thus were *inappropriate as applied in the public sector.*

57 Fed. Reg. 37,672 (1992) (emphasis added); *see also, SEIU*, 35 F.3d at 489 ("[T]he 1954 salary test clearly conflicted with congressional intent that public sector

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[3] The salary basis test is codified at 29 C.F.R. § 541.118(a).

employers be able to claim the administrative and executive exemption.").

Plaintiffs have suggested that the DOL never intended to invalidate the salary basis test prior to 1991 because the attempt to make 29 C.F.R. § 541.5d retroactive was withdrawn. This interpretation of the withdrawal misconstrues the motivations of the DOL. Without question, the DOL initially intended that the revised salary basis test should be applied retroactively to the public sector. 57 Fed. Reg. 37,678. However, as a result of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), such a retroactive application would have exceeded the DOL's rulemaking authority. The withdrawal by the DOL cannot reasonably be construed as evidence of anything other than the DOL's concern for not exceeding its authority. On the contrary, this Court concurs with the inference drawn by the Ninth Circuit:

> We believe the DOL's interest in applying the new salary test retroactively is indicative of its firm conviction that its earlier iteration of the salary test conflicted with congressional intent.

SEIU, 35 F.3d at 489. Were the Ninth Circuit's inference based on nothing other than speculation regarding the withdrawal, the inference might give this Court pause. However, as noted above, the DOL, itself, could not have more unequivocally stated its own belief that the 1954 salary basis test was in conflict with Congress' statutory intent. *See*, 57 Fed. Reg. 37,672 (1992), cited supra, at 489.[4]

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[4] It is well established that the interpretations of an agency congressionally charged with interpreting and enforcing a

Plaintiffs also contend that because *some* public sector employers were able to comply with the salary basis test before September 6, 1991, the Ninth Circuit's concerns regarding public accountability cannot justify invalidating the salary basis *per se*. This argument is not persuasive. The fact that certain public sector employers succeeded in complying with the pre-1991 salary basis test does not warrant the conclusion either (1) that they did so without violating principles of public accountability; or (2) that such principles are not worthy of judicial consideration. After all, the DOL must have considered these principles significant enough to encompass them within the scope of 29 C.F.R. § 541.5d. Moreover, a regulation which the DOL could have applied only to *some* public sector employers, but not to others, would have been inconsistent with Congress' intent that *all* public employers be able to invoke the executive and administrative exemptions.

Finally, plaintiffs urge this Court to conclude that, even if the pre-1991 salary basis test is to be invalidated as applied to the public sector, the City can still be held liable for "improper" disciplinary suspensions which occurred prior to September 6, 1991. The Court disagrees. The provision which prohibits disciplinary suspensions without pay for reasons other than violations of major safety rules is codified at 29 C.F.R. § 541.118(a)(5). This

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statutory scheme are due great deference. *Stinson v. U.S.*, 113 S.Ct. 1913 (1993); *Castano v. I.N.S.*, 956 F.2d 236 (11th Cir. 1992). This Court has no grounds to conclude that the DOL's conclusions regarding the inconsistency between the pre-1991 salary basis test and Congress' intent are erroneous or otherwise contrary to law.

provision is a subsection of the larger salary basis test which is codified at 29 C.F.R. § 541.118(a). As a matter of statutory or regulatory construction, it makes no sense to conclude that the primary test – the salary basis test – should be invalidated, but that an exception to the test should still be enforced. To do so would beg the question from what standard the exception is being sought.

Moreover, the reasoning of the Court's decision in SEIU is instructive in this instance:

> We therefore conclude that the salary test, 29 C.F.R. § 541.118(a), as it existed before the DOL suspended its application to public employers on September 6, 1991 was *invalid in its entirety* as it applied to the public sector. *No part of that test remains valid in this context. It is not possible to salvage parts of it given its basic infirmity.*

SEIU, 35 F.3d at 489 (emphasis added). This Court concurs. The flaw in the pre-1991 salary basis test is fundamental; the test was, after all, the DOL's effort to define which employees could be considered exempt from the requirements of the FLSA. In creating such a definition and applying it within the public sector, the definition actually defeated the intent of Congress to provide § 213(a)(1) exemptions to state and local governments. Such an inconsistent interpretation has no place in public sector FLSA analysis.

Accordingly, the Court finds that the salary basis test, as it existed prior to its modification on September 6, 1991, cannot be applied to public sector employers. The Court further finds that the pre-1991 salary basis test must be invalidated in its entirety. As a result, the City

cannot be held liable for "improper" disciplinary suspensions or deductions of any kind which occurred prior to September 6, 1991.[5]

B. CITY'S EXERCISE OF THE WINDOW OF CORRECTION

In the Spring of 1994, the City exercised the so-called window of correction, 29 C.F.R. § 541.118(a)(6) (1993). This section provides as follows:

> . . . where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will [sic] be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The Court finds this regulation to be straightforward and clear and the Court also finds that courts have uniformly upheld management exemptions where employers have complied with its terms. *See, Hartman v. Arlington County, Virginia,* 720 F. Supp. 1227 (E.D. Va. 1989); *International Association of Firefighters v. City of Alexandra,* 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd.* 912 F.2d 463 (4th Cir. 1990); *Simmons v. City of Fort Worth, Texas,* 805 F. Supp. 419 (N.D.

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[5] Notwithstanding this legal ruling, the Court also concludes, as articulated below, that the City nonetheless properly exercised the window of correction to avoid any liability which might have arisen from "improper" disciplinary suspensions before or after September 6, 1991. In fact, only one disciplinary suspension occurred after September 6, 1991. Employee, Sandra Kichler, was suspended on October 29, 1991 for three days.

Texas 1992); *Kuchinskas v. Broward County,* 840 F. Supp. 1548 (S.D. Fla. 1993); and *Lee, supra,* et al.

The plaintiffs' challenge to the City's exercise of the window of correction raises the following issues:

1. the timeliness of the correction;

2. whether the deductions to salary must be inadvertent *and* for reasons other than lack of work;

3. the alleged "willfulness" of the City's actions in suspending management employees; and

4. the City's reimbursement of two management employees who had been suspended for one and two weeks, respectively, after the plaintiffs' motion for summary judgment had been filed.

The Court will address each of these challenges in the order presented.[6]

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[6] In its written memoranda, plaintiffs also questioned a) the thoroughness of the audit, and b) argue that the Court can either ignore the window of correction or need not follow the *Lee* case. This Court finds no question of fact with regard to the thoroughness of the audit, especially since the records which were audited by the City were available to the plaintiffs during the discovery process. The plaintiffs could have presented the Court with the names of individuals whom the City failed to reimburse, if that had, in fact, occurred. Further, the Court does not believe it can merely ignore the window of correction under the facts of this case, nor can it ignore the clear holding in the *Lee* case.

1. Timeliness of the Correction

The Court finds that the window of correction itself places no time limit as to when the window of correction can be exercised. 29 C.F.R. § 541.118(a)(6). Courts have enforced the window of correction when exercised prior to the commencement of a lawsuit or during the course of a lawsuit. *See, Hartman, supra; Kuchinskas, supra; International Association of Firefighters, supra;* and *Simmons, supra.* In fact, the only case cited by any of the parties in which the timeliness of the employer's exercise of the window of correction was at issue is *Hawks v. City of Newport News, Virginia,* 707 F. Supp. 212 (E.D. Va. 1988), in which the Court disallowed the exercise of the window of correction *during trial,* and then only because the revised policy was not on the employer's exhibit list. Nothing close to that factual scenario exists in the instant case. As a result, the Court finds that the exercise of the window of correction is timely.

2. Alleged "willfulness" of the City

The plaintiffs next claim that because the City "willfully" suspended management employees, the window of correction is not available to the City. The plaintiffs have cited no caselaw to the Court in which "willfulness" was relevant to the ability of an employer to exercise the window of correction. Further, since the regulation itself states that it is available with regard to deductions which were "inadvertent, *or* . . . made for reasons other than lack of work," it clearly suggests that the deductions need not have been inadvertent. *See* discussion, *infra,* regarding interpretation of § 541.118(a)(6). Further, courts have

permitted the exercise of the window of correction even where employers have had an express, written policy permitting deductions to salary. *See, Lee,* 20 F.3d at 431 (written memorandum specifically provided for reduction of salary where no leave time remained).[7] Surely, nothing could be more "willful" than an explicit written policy. Yet, under such facts, the Eleventh Circuit, among other courts, has permitted the use of the window of correction to reinstate an employer's exemption for its management employees.

3. Disjunctive Interpretation of the Regulation

Plaintiffs also claim that the window of correction can only be exercised where the deductions were *both* inadvertent and for reasons other than lack of work. Plaintiffs have provided the Court with no reasonable explanation as to why the clear language of the regulation which uses the disjunctive word "or" and not the conjunctive word "and" should be interpreted in a manner other than its clear meaning. Further, this Court is bound by the decision of the Eleventh Circuit in *Lee* in which the Eleventh Circuit stated as follows:

> The regulation is clearly written in the disjunctive, so either circumstance suffices. The district court, in denying the summary judgment motion, stated that some courts have read the provision conjunctively. Such judicial rewriting of regulations is improper. A court should presume regulations mean what they say. If the

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[7] Reference to this express written policy was made in the *Lee* district court opinion, p. 8, dated November 24, 1992.

> executive branch wishes to reconsider them, it is free to do so. Judicial assistance is not required.

Lee, 20 F.3d at 433 (citations omitted). As a result, the Court finds that the regulation should be read in the disjunctive.[8]

4. Two Deductions Reimbursed After Filing of Plaintiffs' Motion for Summary Judgment

The City did not reimburse the two management employees who were suspended for periods of one week and two weeks respectively, until after plaintiffs' motion for summary judgment was filed. The City has stated in its memoranda that suspensions in one-week increments are not prohibited by the FLSA as a result of 29 C.F.R. 541.118(a) and interpretive caselaw and DOL opinions. *See Lucero v. Regents of University of California*, 1993 WL 341287 (N.D. Cal.); *Mueller v. Thompson*, 1994 WL 392497 (W.D. Wis.); *DOL Op. Ltr.*, March 29, 1991; *DOL Op. Ltr.*, November 10, 1992. Because the City has reimbursed these employees and has prohibited all suspensions of management employees, this Court need not determine whether suspensions of management employees for one-week increments are prohibited by the FLSA. However, plaintiffs have presented no caselaw in support of their

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[8] Although not urged at oral argument, the plaintiffs have asserted in their memoranda that disciplinary suspensions were occasioned by the City because of "lack of work." The Court finds no support for this argument, and since it is undisputed that all suspensions were a result of discipline, the Court finds that the deductions were made for reasons "other than lack of work."

argument that the two later suspensions were improperly made since the plaintiffs had already filed a motion for summary judgment.

The Court does not find the filing of a motion for summary judgment is akin to the commencement of a trial where new evidence cannot be added or argued. The plaintiffs had ample time to address the final two reimbursements, to conduct discovery, if necessary, and to make their legal arguments. In fact, the City filed an "amended" motion for partial summary judgment re window of correction *after* the final two reimbursement checks were sent. As a result, the plaintiffs were given a full and timely opportunity to address these remedial measures.

Therefore, the Court finds that the window of correction was properly exercised and that the executive, administrative, or professional exemption for all City employees, to the extent lost, has now been reinstated. Since the plaintiffs conceded at oral argument that there were no actual pay deductions for absences of less than a day, it is not necessary for the City to make any reimbursements other than those already made due to disciplinary suspensions.

C. EFFECT OF DEDUCTIONS TO LEAVE BANKS

In addition to specific suspensions, plaintiffs argue that the City has violated the FLSA by reducing or eliminating comp time and other leave available to its management employees. Plaintiffs also urge that since management employees could convert leave time into

cash, leave time, including comp time, is the same as "salary" and, as a result, deductions therefrom would violate the FLSA. For the reasons set forth below, the Court does not find that either theory is supported by the caselaw and neither claim would result in the loss of the exempt status of the City's management employees.

1. Deductions to Leave

With few exceptions, courts have generally found that deductions to leave banks of management employees do not result in the loss of § 213(a)(1) exemptions and do not violate the FLSA. *See, e.g., York v. City of Wichita Falls,* 944 F.2d 236 (5th Cir. 1991); *Michigan Association of Governmental Employees v. Michigan Department of Corrections,* 992 F.2d 82 (6th Cir. 1993); *McDonnell v. City of Omaha,* 999 F.2d 293 (8th Cir. 1993); *Barner v. City of Novato,* 17 F.3d 1256 (9th Cir. 1994). A case decided in the Southern District of Florida makes the same finding. *Kuchinskas, supra.* Further, since *Lee* involved a policy of deductions to leave and the Court notes that reimbursements only occurred as to "each captain and assistant chief whose *wages* had been reduced," it appears that the Eleventh Circuit has also recognized that it is deductions to *salary* which are prohibited by the FLSA and *not* deductions to leave. *Lee,* 20 F.3d at 431.

Additionally, the Ninth Circuit in *Barner* specifically held that "a reduction in the paid leave time does not affect the plaintiffs' status as salaried employees." *Barner,* 17 F.3d at 1261-1262. *Barner* further stated:

> We agree with the district court's conclusion that the City's policy of reducing paid leave

> does not violate the administrative or executive exemption to the FLSA.

Id. at 1263. In so finding, the Ninth Circuit specifically rejected three prior district court decisions which had held or suggested that deductions to leave were inconsistent with the salaried status of an exemption employee. *Id.* at 1261, n. 7. This Court agrees with this caselaw and finds that deductions to leave time or comp time by the City does not affect the salaried status of the plaintiffs.

2. Comp Time as "Salary"

Plaintiffs further argue that comp time in the City was actually "salary" because it was used to increase total compensation and because management employees would not know at the beginning of the year what their total compensation would be at the end of the year. In this way, plaintiffs suggest that they did not have "predetermined" salaries.

First of all, the Court notes that the regulations do not require that, in order to satisfy the salary basis test, an employee's predetermined salary must constitute his/her total compensation. In fact, § 541.118(b) specifically states as follows:

> It should be noted that the salary may consist of a predetermined amount constituting all or part of the employees [sic] compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment.

Therefore, the mere fact that the plaintiffs may have realized additional compensation by "cashing out" their

leave time is not inconsistent with the salary basis test and is, instead, specifically permitted.

The Court further finds that the existence of a comp time system for management employees is not prohibited by the FLSA. In *Michigan Association of Government Employees,* the Sixth Circuit noted that exempt employees in that case were given compensatory time credits equivalent to and aggregated with sick leave credits for extra hours worked beyond a forty-hour work week. *Michigan Association of Government Employees,* 992 F.2d at 84. The DOL has also found that such a system is not inconsistent with the exempt status of management employees. The DOL has stated as follows:

> although it is not required by FLSA, an employer may provide additional benefits, such as compensatory time off, bank credit hours, or monetary compensation, to such exempt employees when they work in excess of forty hours in a work week.

DOL Op. Ltr., March 16, 1984.

In short, the law requires that exempt employees cannot receive anything *less* than their predetermined salary, but they are specifically permitted to receive *more,* whether in the form of bonuses, commissions, or leave time. Merely the fact tnat an exempt employee may not know at the beginning of a year what his total compensation will be at the end of the year does not affect his exempt status.[9] Section 541.118(b) specifically provides

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[9] Plaintiffs have argued that *Atlanta Firefighters* requires a contrary conclusion. The Court disagrees. In *Atlanta Firefighters,*

for the payment of a commission to salaried employees. Certainly, exempt employees who are paid commissions on a regular basis would never know at the beginning of the year what their total final compensation would be that year. Nevertheless, the regulations specifically provide that exempt employees may receive commissions without affecting their salaried status.

Finally, the Court finds that since leave time is not the same as "salary," the fact that certain witnesses might testify that leave time was used to increase total compensation for the plaintiffs is not legally relevant. *Barner* found that deductions to leave did not affect exempt status even though leave, in that instance, could be converted to cash upon termination and reductions to leave would have resulted in a reduction of total compensation. The plaintiffs in this case have not established any facts to support the claim that deductions to actual salaries ever occurred, other than the deductions which were reimbursed by the City's exercise of the window of correction. Since "salaries" do not include leave time, reductions to leave banks, including comp time, do not affect the exempt status of the City's management employees.

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the Court was concerned that the employees "knew at the beginning of each year the exact amount of pay for each . . . [pay] cycle." *Atlanta Firefighters* 920 F.2d at 805. The Eleventh Circuit was not concerned that the employees know the total *annual* compensation.

V. Conclusion

THE COURT has considered the motions and the pertinent portions of the record, the arguments and stipulations of counsel at oral argument, and being otherwise fully advised in the premises, it is ORDERED and ADJUDGED as follows:

1. The City's motion for partial summary judgment with regard to the salary basis test is hereby GRANTED. The Court finds that the salary basis test, as it existed prior to its modification on September 6, 1991, cannot be applied to public sector employers, including the City.

2. The City's motion for partial summary judgment regarding the window of correction is hereby GRANTED. As a result, the issue of disciplinary suspensions as a basis for alleging a violation of the FLSA is hereby resolved in favor of the City.

3. The plaintiffs' motion for summary judgment is hereby DENIED.

4. The City's motion for summary judgment filed on January 30, 1994 and its second motion for summary judgment filed on May 11, 1994 relating to reductions of accrued leave are hereby GRANTED. The result of this ruling is that irrespective of the validity of the pre-1991 salary basis test within the public sector, judgment is entered in favor of the City with regard to the salary basis test.

5. The City is still obligated to demonstrate that the job duties of each of the plaintiffs renders him or her exempt from the overtime requirements of the FLSA. The

Court will set the job duties test for trial upon its own motion.

DONE and ORDERED in Chambers at West Palm Beach, Florida, this 2 day of May, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Joseph Serota
Timothy McDermott
Brenda Carter
Bonni Jensen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS,
MIKE ROZOS, on behalf of
themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

OMNIBUS ORDER

(Filed Jun. 6, 1995)

THE CITY OF HOLLYWOOD
a municipal corporation
of the State of Florida,

Defendants.

_____/

THIS CAUSE came before the Court upon plaintiffs' Motion for Summary Judgment on the Validity of the Window of Correction, plaintiff's Request for Oral Argument on Plaintiff's Motion for Summary Judgment on Validity of Window of Correction and Plaintiff's Motion to Alter or Amend Judgment. The defendant ("the City") has responded in opposition. The Court will address each Motion in the order presented.

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE VALIDITY OF THE WINDOW OF CORRECTION

In the spring of 1994, the City exercised the so-called window of correction, 29 C.F.R. § 541.118(a)(6) (1993). This section provides that

> where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The plaintiffs vehemently challenged the City's exercise of the window of correction pursuant to the City's Motion for Summary Judgment on the Window of Correction. After reviewing the briefs and conducting oral argument, however, the Court found that the window of correction had been correctly exercised and that the executive, administrative, or professional exemption for all City employees, to the extent lost, had been reinstated.[1]

In so ruling, the Court relied on *Lee v. Flight Safety Service Corp.*, 20 F.3d 428 (11th Cir. 1994), which held that because the regulation is clearly written using the disjunctive word "or" and not the conjunctive word "and," the regulation should be interpreted as disjunctive.[2] Based on the Eleventh Circuit ruling, the regulation was read by this Court to permit the window of correction to be exercised where deductions were *either* inadvertent or for reasons other than lack of work. Because the City's deductions were found to be for reasons "other than lack of work," the Court held that the window of correction had been properly exercised.

Plaintiffs now argue that the window of correction should be adjudged invalid because it is (1) inconsistent

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[1] *See* Order Granting Summary Judgment in Favor of City on "Salary Basis" Test, May 2, 1995 ("the May 2, 1995 Order").

[2] *See* May 2, 1995 Order at 17 (citing *Lee*, 20 F.3d at 433).

with federal statutory law, (2) inconsistent with federal regulations, and (3) inherently irrational.[3] Each argument presented by plaintiff involves the issue of whether the language contained in the DOL regulation governing the window of correction should be interpreted as disjunctive or conjunctive. This issue was decided in *Lee, supra,* by the Eleventh Circuit and under the doctrine of *stare decisis,* this Court is bound by the Eleventh Circuit ruling. For this reason, the plaintiffs' Motion is DENIED.

II. PLAINTIFFS' REQUEST FOR ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON VALIDITY OF WINDOW OF CORRECTION

Pursuant to the Court's denial of the plaintiffs' Motion for Summary Judgment on the Validity of the Window of Correction, the plaintiffs' request for oral argument on this matter is DENIED as MOOT.

III. PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

The plaintiffs have moved the Court to amend the May 2, 1995 Order to (1) include disposition of plaintiffs' pending motion for summary judgment on the validity of the window of correction and (2) to add a certification for interlocutory appeal pursuant to Fed. R. Civ. P. 59(e) and F.R.A.P. 5(a). The Court shall address each in turn.

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[3] *See* Pl. Motion for Summary Judgment at 2.

A. Amendment to Include Pending Motion

In view of the Court's denial of plaintiffs' Motion for Summary Judgment on the Validity of the Window of Correction, above, plaintiffs' motion for an amendment to include the pending motion is DENIED as MOOT.

B. Amendment to Add Certification for Interlocutory Appeal

The plaintiffs' [sic] have requested certification for an interlocutory appeal of the Court's May 2, 1995 ruling on the salary basis test. Plaintiffs have further requested that the Court stay further proceedings in this case pending resolution of the interlocutory appeal.

The Court acknowledges plaintiffs' argument that a reversal of the May 2, 1995 ruling on the salary basis test may eliminate the need for a trial on the job-duties test. However, the Court is unable to justify staying the proceedings in a case which has been ongoing since 1992. Accordingly, the Court GRANTS plaintiffs' request to add certification for an interlocutory appeal of the May 2, 1995 Order as follows:

> Pursuant to the provisions of 28 U.S.C. § 1292(b), the Court certifies an interlocutory order for appeal of the May 2, 1995 ruling regarding the salary basis test because it involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation.

The certification of appeal is ordered provided, however, that application for appeal *shall not* stay proceedings in the district court.

IV. CONCLUSION

THE COURT has considered the Motions and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

(1) plaintiffs' Motion for Summary Judgment on the Validity of the Window of Correction is DENIED;

(2) plaintiffs' Request for Oral Argument on plaintiffs' Motion for Summary Judgment on the Validity of the Window of Correction is DENIED; and

(3) plaintiffs' Motion to Alter or Amend Judgment is GRANTED IN PART and DENIED IN PART as outlined above.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 6 day of June, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

Copies provided:
Brenda Carter
Joseph Serota
Timothy McDermott
Bonni Jensen
Barbara Duffy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS, et al.,
Plaintiffs,

vs.

ORDER TAXING COSTS

(Filed Dec. 1, 1995)

THE CITY OF HOLLYWOOD,
a municipal corporation
of the State of Florida,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendant's Verified Motion for Taxation of Costs, (DE 362) filed October 20, 1995. The Plaintiff responded in opposition on November 7, 1995.

THE COURT has considered the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the said Motion be, and the same is hereby GRANTED. Costs will be awarded to the Defendant under Fed.R.Civ.P. 54(d). Contrary to the position taken by the Plaintiff, 29 U.S.C. § 216(b) does not preclude awarding costs to a prevailing defendant. Defendant is hereby entitled to the following award:

(1)	photo copy expenses	2,720.01
(2)	Court reporter and Deposition charges	6,720.10
(3)	Witness Fees	90.00
(4)	Mediation Fee	287.00
	TOTAL	9,817.11

The Court will award no costs for computerized research as the Court finds this to be in the nature of attorney's fees.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 30 day of Nov, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

Copies provided:
Barbara Duffy
Bonni Jensen
Brenda Carter
Timothy McDermott

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5304 and 95-5536

BURICE [sic] W. DAVIS,
MIKE ROZOS, on behalf of themselves and
all other present and former employees
similarly situated,

Plaintiffs-Appellants,

versus

BERNICE W. ROWE, HERBERT CHERNOV,
ERNEST W. ATKINS, WILLIAM SHULBY, et al.,

Plaintiffs, [sic]

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Nov. 13, 1997)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___.

Before: HATCHETT, Chief Judge, COX, Circuit Judge, and MESKILL*, Senior Circuit Judge.

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* Honorable Thomas J. Meskill, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. W. Hatchett
CHIEF JUDGE

ORD-42
(6/95)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4000

D. C. Docket NO. 91-6537-CV-UUB

WILLIAM KUCHINSKAS, ROBERTA HARTWELL, on behalf of themselves and all other present and former employees similarly situated, et al.

Plaintiffs-Appellants,

versus

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 17, 1996)

Before TJOFLAT, Chief Judge, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants are a class of Broward County, Florida, employees classified by the County as exempt from the minimum wage and overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219

(1994).[1] They allege that the County's policy of docking an employee for partial-day absences, by making a deduction either from the absent employee's pay or from the absent employee's leave bank, removed the appellant class from the FLSA exemption, and thus the class is owed back overtime pay and liquidated damages. After a two-day bench trial, the district court entered judgment in favor of the County. We affirm.

Since 1985, the FLSA has applied to public sector employees. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 105 S. Ct. 1005, 1020, 83 L. Ed. 2d 1016 (1985). The FLSA requires that covered, non-exempt employees receive a minimum wage and overtime pay for hours worked over forty hours per week. 29 U.S.C. §§ 206, 207. Some employees, however, are exempt from the FLSA's overtime provisions. Section 213 of the FLSA provides an exemption for all persons employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The regulations promulgated pursuant to the FLSA define an "employee employed in a bona fide executive, administrative, or professional capacity" as an employee with supervisory duties who is paid on a salary basis as opposed to an hourly wage. See 29 C.F.R. § 541.1(f) (1995); 29 C.F.R. § 541.117(a) (1995). To claim an exemption from the FLSA's requirements, an employer must prove that an employee meets two tests: the "job duties" test and the

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[1] Section 213(a)(1) of the FLSA provides that the minimum wage and maximum hour requirements of the FLSA "shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity."

"salary basis" test. See 29 C.F.R. § 541.1(1)-(f); *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

Appellants contend first that the County did not meet its burden of proof with respect to the "job duties" test. It is clear from the record, however, that appellants waived this issue prior to trial. The record reveals that all involved, including the court, believed that the only issue for trial was whether the County could meet the "salary basis" test.[2] Appellants cannot challenge for the first time on appeal an issue they did not raise before the district court. *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984).

Appellants also contend that the County failed to meet its burden of proof under the "salary basis" test with respect to employees who had been docked for

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[2] The appellants raised the County's failure to offer proof on the "job duties" test for the first time in a footnote in a memorandum in response to the County's supplemental memorandum challenging the constitutionality of the "salary basis" test as applied to public sector employers. Appellants did not mention the "job duties" test again until four months after trial and after final judgment had been entered for the County. During his opening statement at trial, the attorney for the County told the court that "[t]he [appellants] . . . meet the job duties test." Appellants did not object. Later during the trial, the County attorney objected to a question on cross-examination of a County witness, saying, "The [issue] here is, of course, salary basis, not duties test." The appellants did not challenge this statement or respond to the objection. In sum, neither the district court nor the County would have had any reason to suspect, either before the trial or during the trial, that appellants were challenging the FLSA exemption on the basis of the "job duties" test.

partial-day absences. We need not decide the issue, however, because even if the affected employees were not paid on a "salary basis," the County can benefit from the so-called "window of correction" contained in the regulations:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (1995).

Appellant argues that this regulation should be read to require the deduction in all instances to be inadvertent; accordingly, since the deductions at issue were made pursuant to the express policy of the County and thus were not inadvertent, the "window of correction" does not apply. Unfortunately for the appellants, this court has decided that the plain meaning of the regulation is disjunctive; that is, the exemption is not lost when the deduction is "inadvertent" *or* "is made for reasons other than lack of work." *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir. 1994). Here, the deductions were made for partial-day absences, not for lack of work, and the county has reimbursed the affected employees.[3] The

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[3] Since this lawsuit was filed, the Department of Labor has rewritten the salary basis portion of the "executive, administrative, or professional" exemption to make it clear that deductions for partial-day absences by public sector employers will not destroy the affected employee's FLSA exemption. See

County therefore comes within the protection of the "window of correction" and does not lose the FLSA exemption with respect to those employees.

AFFIRMED.

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29 C.F.R. § 541.5d (1995) (as added by 57 Fed. Reg. 37,666, 37,677 (1992)). Obviously, the County need not promise to comply with the out-of-date regulation.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHLEEN KLEM, et al., Plaintiffs, vs. COUNTY OF SANTA CLARA, Defendant.	Nos. C-91-20674 RMW, C-95-20454 RMW Related Cases
HAROLD ASSENZA, et al., Plaintiffs, vs. COUNTY OF SANTA CLARA, SANTA CLARA BOARD OF SUPERVISORS, Defendants.	Secretary of Labor's Brief as Amicus Curiae

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary") has a significant interest in these related cases. The issue before this Court is the proper interpretation to be given the "window of correction," 29 C.F.R. 541.118(a)(6), which, under limited circumstances, provides a means of preserving the statutory exemption from paying overtime compensation for bona fide executive, administrative, or professional employees under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 213(a)(1). Because the "window of

correction" is part of the "salary basis" regulation promulgated by the Secretary, 29 C.F.R. 541.118(a), the Secretary's interpretation of the "window" is entitled to considerable deference. *See Auer v. Robbins*, 117 S. Ct. 905, 911 (1997). In its motion for summary judgment, the County of Santa Clara relies upon the language of the "window of correction," as well as the Supreme Court's decision in *Auer*, to argue that the "window" is available even when multiple impermissible deductions under the "salary basis" test have been made pursuant to an established policy, provided only that those deductions were "made for reasons other than lack of work," 29 C.F.R. 541.118(a)(6). It is the Secretary's position that this reading misconstrues both the "window of correction" regulation and the Supreme Court's discussion of that regulation in *Auer*.

STATEMENT OF THE ISSUE

Whether the County of Santa Clara can avail itself of the Secretary's regulatory "window of correction" to preserve the statutory exemption from paying overtime compensation under the FLSA when it made, pursuant to an established policy, multiple impermissible disciplinary deductions under the "salary basis" test over approximately a six-year period.

ARGUMENT

THE COUNTY OF SANTA CLARA CANNOT UTILIZE THE "WINDOW OF CORRECTION" TO AVOID PAYING OVERTIME COMPENSATION UNDER THE FLSA WHERE IT HAS MADE, PURSUANT TO AN ESTABLISHED POLICY, MULTIPLE IMPERMISSIBLE DISCIPLINARY DEDUCTIONS UNDER THE "SALARY BASIS" TEST OVER APPROXIMATELY A SIX-YEAR PERIOD OF TIME.

A. Statutory And Regulatory Framework

Under section 7(a)(1) of the FLSA, 29 U.S.C. 207(a)(1), an employer is required to pay each of its employees overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed" for every hour worked over forty in a workweek. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the overtime provision for "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary)."

Pursuant to this explicit authority to define the limits of the statutory exemption, the Secretary, after providing notice and an opportunity for comment under the Administrative Procedure Act, promulgated regulations setting out a duties test, a salary level test, and a "salary basis" test, all which must be met to show that the employees in question have bona fide executive, administrative, or professional status, and are thereby entitled to

the section 13(a)(1) exemption. *See* 29 C.F.R. 541.1 (executive), 541.2 (administrative), 541.3 (professional), 541.118(a) ("salary basis").

The "salary basis" regulation was promulgated after a Department of Labor report indicated that there was a direct correlation between an employee being paid on a "salary basis" and bona fide executive, administrative, or professional status. *See* United States Department of Labor, Wage and Hour Division, *"Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (1940). This rationale for the "salary basis" test was reiterated in a report issued by the Department of Labor after hearings were held in 1947. *See* United States Department of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations on Proposed Revisions of Regulations, Part 541, Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman"* (1949). The "salary basis" regulation in effect today is the same as that promulgated in 1954. *See* 19 Fed. Reg. 1321, 4405-06 (1954).

The "salary basis" regulation provides that an employee will be deemed to be paid on a "salary basis" "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of the work performed.*" 29 C.F.R. 541.118(a) (emphasis added). An employee paid on a "salary basis" must receive his full salary for any workweek in which he performs *any* work,

but need not be paid for any workweek during which he has performed *no* work. *See ibid.*

The Secretary enumerated certain exceptions to the "salary basis" test. The exception pertinent to the instant case permits employers to impose penalties "for infractions of safety rules of major significance" without employees losing their salaried status. 29 C.F.R. 541.118(a)(5). By reference to this disciplinary exception and the general "salary basis" test, an employee will not be considered to be salaried if he is suspended for less than a full workweek because he violated anything other than a major safety rule.

Finally, the "salary basis" test provides a "window of correction." *See* 29 C.F.R. 541.118(a)(6). Since the resolution of the case before this Court turns on the correct interpretation of this provision, it is worth quoting in its entirety:

> The effect of making a deduction which is not permitted under these interpretations *will depend upon the facts in the particular case.* Where deductions are generally made when there is no work available, it indicates that *there was no intention to pay the employee on a salary basis.* In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. *On the other hand,* where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. 541.118(a)(6) (emphasis added).

B. The "Window Of Correction" Is Closed To The County Of Santa Clara Because It Made Multiple Impermissible Disciplinary Deductions Pursuant To An Established Policy Over Approximately A Six-Year Period.

It is undisputed that from September 6, 1991 to the present, the County of Santa Clara ("County"), pursuant to an established policy, made more than 50 impermissible disciplinary deductions in the pay of its exempt employees, i.e., suspensions for less than a week for reasons other than major safety infractions. *See* Defendants' Motion for Summary Judgment in *Klem* and *Assenza* Cases at 7 (8/1/97) ("During the six-year period from September 6, 1991 through the present, 54 of the County's 5,230 exempt employees received disciplinary suspensions [for non-major safety violations] not precisely coinciding with a complete workweek.") (footnote omitted).[1] The "window of correction" should not be read

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[1] The County states that of these more than 50 improper disciplinary deductions in pay, 13 were from the approximately 900 registered nurses in the Registered Nurses Professional Association (the plaintiffs in the *Klem* case are or were registered nurses), and 10 were from the approximately 1,000 members of the County Employees Management Association (the plaintiffs in the *Assenza* case are or were management employees). *See* Defendants' Motion for Summary Judgment at 7-8. The relevant time period begins to run on September 6, 1991, because the Ninth Circuit held that prior to that date, when the Secretary amended the "salary basis" test for public employees in regard to partial-day deductions for absences, 29 C.F.R. 541.5d, the entire "salary basis" test, including the disciplinary portion, was invalid. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1353 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996). The County claims to have changed its policy

to allow an employer to retain the statutory exemption from paying overtime compensation, where that employer has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy. This interpretation is supported by reading the "window of correction" regulation in context, and it is not in tension with the Supreme Court's discussion of the "window" in *Auer*.

In *Auer*, the Supreme Court accorded an extraordinary degree of deference to the Secretary's interpretation of her own "salary basis" regulation. The Court stated that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 117 S. Ct. at 911 (internal quotation marks omitted). *See also Stanley v. City of Tracy*, 120 F.3d 179, 183 (9th Cir. 1997) (recognizing the high level of deference that the Supreme Court in *Auer* granted to the Secretary's interpretation of her "salary basis" regulation). When laying out this principle of deference, the Supreme Court was specifically addressing the Secretary's interpretation of when an employee's compensation will be considered to have been "subject to reduction" under the "salary basis" test at 29 C.F.R. 541.118(a). However, there can be no doubt that the Court's broad formulation concerning deference applies

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allowing for impermissible disciplinary deductions on May 21, 1997. *See* Defendants' Motion for Summary Judgment at 8. In orders issued on April 1, 1996, this Court concluded that the County violated the disciplinary portion of the Secretary's "salary basis" test.

to the Secretary's interpretation of the "window of correction" as well, since the "window" forms a part of the Secretary's "salary basis" regulation.

Indeed, the Secretary, through the Acting Solicitor General, has already spoken to the proper interpretation to be given to the "window of correction." In her amicus brief filed with the Supreme Court in *Auer*, the Secretary stated as follows:

> Respondents can correct the single disciplinary deduction of less than one week's pay by satisfying the terms of the "window of correction" regulation. 29 C.F.R. 541.118(a)(6). *The window of correction is not open when an employer engages in a pattern of improper deductions.* The window is open, however, to correct a *one-time deduction* of less than one week's pay.

Amicus Brief of the United States in *Auer* at 15 (emphasis added). The Secretary also stated in that same brief that "[t]he 'window of correction' regulation addresses the effect of actual deductions on salaried status, and it makes clear that such deductions result in a loss of the exemption when they demonstrate that the employer *has no intent to pay its employees on a salaried basis*, and, therefore, to treat them as 'bona fide' executive, professional, or administrative personnel." *Id.* at 23-24 (emphasis added). Similarly, "[w]hen the deductions indicate that there was 'no intention to pay the employees on a salary basis,' the exemption is not applicable." *Id.* at 28 (quoting 29 C.F.R. 541.118(a)(6)).[2]

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[2] The Secretary also cited approvingly the Eighth Circuit's conclusion in *Auer* that "the window of correction 'is not

Consistent with this position is a December 24, 1991 opinion letter issued by the Wage and Hour Division of the Department of Labor. That letter states as follows:

> The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in § 541.118[a](6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks if the employer reimburses the employee for such deduction and agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's policy), we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in all workweeks.

Salary Basis, Wage & Hour Manual (BNA) 99:5257 (emphasis omitted), *quoted in* Amicus Brief of the United States in *Auer* at 28. The Ninth Circuit Court of Appeals has specifically recognized that Wage-Hour opinion letters are entitled to deference. *See Boykin v. Boeing Co.*, No. 96-35482, 1997 WL 657287, at *3 (9th Cir. Oct. 23, 1997) ("The Secretary's interpretation of the salary-basis test as it relates to overtime compensation is articulated clearly in DOL's Opinion letters and is entitled to our court's deference."). The Secretary's interpretation could not be

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available if the employer has a settled policy of making improper deductions.' " Amicus Brief of the United States in *Auer* at 28 (quoting *Auer v. Robbins*, 65 F.3d 702, 711 (8th Cir. 1995), *aff'd*, 117 S. Ct. 905 (1997)).

more clear, and under that interpretation, the County is precluded from using the "window of correction" because it clearly engaged in a pattern of improper disciplinary deductions pursuant to an established policy.

The County bases its contrary interpretation on a single sentence in the "window of correction" regulation. It looks to the last sentence of the "window" provision, which states that the statutory exemption will not be lost if an impermissible deduction "is inadvertent, or is made for reasons other than lack of work." It thus contends that irrespective of the number of deductions taken that are inconsistent with the "salary basis" test, the "window of correction" is nevertheless available if those deductions were "made for reasons other than lack of work."[3] The County further argues that its position is supported by the Supreme Court's decision in *Auer*, in which the Court concluded that even though the one-time disciplinary deduction at issue in that case was not inadvertent, "the plain language of the ["window of correction"] regulation sets out 'inadverten[ce]' and 'made for reasons other than lack of work' as *alternative* grounds permitting corrective

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[3] The County has represented in its motion for summary judgment that it has met, or is in the process of meeting, the other conditions of the "window" – reimbursement of the effected employee in the amount of the deduction taken, and promising to comply in the future. As alluded to above, the County maintains that it has changed its policy of permitting improper disciplinary deductions, and states that it is in the process of reimbursing all employees from whom impermissible disciplinary deductions in pay were made. *See* Defendants' Motion for Summary Judgment at 8.

action." 117 S. Ct. at 912. Neither the "window of correction" regulation itself nor the Supreme Court's discussion of that regulation in *Auer* supports the County's position.

In interpreting the "window of correction," the County mistakenly concentrates on the individual sentence referred to above, instead of reading the provision as a whole. This methodology leads to an interpretation that not only is at odds with the purpose of the "salary basis" test, but essentially makes a nullity of it. It is axiomatic that a court is not guided "by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (internal quotation marks omitted). *See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 99 (1992) (same); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (same). "Statutory construction . . . is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (internal quotation marks omitted). *See also United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (same).[4]

Viewing the "window of correction" provision in its entirety, and as part of the larger "salary basis" test, confirms the Secretary's interpretation set forth above. The "window of correction" regulation begins by stating that the effect for any improper deduction "will depend upon the facts in the particular case." 29 C.F.R. 541.118 (a)(6). This highlights the importance of the context in

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[4] By analogy, the same principles may be applied to the interpretation of regulations.

which a deduction is taken. The crux of the regulation is to be found in the next two sentences. They speak of a situation "[w]here deductions are generally made when there is no work available" as "indicat[ing] that there was no intention to pay the employee on a salary basis"; in such a situation "the exemption would not be applicable to him during the entire period when such deductions were being made." 29 C.F.R. 541.118 (a) (6). In other words, an employer's objective *intention* to pay the employee on a "salary basis" is determinative of whether an employer can take advantage of the "window of correction." Thus, an employer that engages in a practice of making impermissible deductions in its employees' pay, or has a policy that is effectively communicated to its employees that such deductions will be made,[5] necessarily has no intention of paying its employees on a "salary basis," and therefore has no recourse to the "window of correction" for actual deductions made. When the pay of a class of employees is "subject to reduction," as explained in *Auer*, 117 S. Ct. at 911, there is no intention to pay that class of employees on a "salary basis" in the first place, and the "window" is therefore shut.

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[5] This is how the Supreme Court in *Auer*, adopting the position set forth in the Secretary's amicus brief, defined the term "subject to reduction" in the "salary basis" test at 29 C.F.R. 541.118(a). "The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy – one which 'effectively communicates' that deductions will be made in specified circumstances." *Auer*, 117 S. Ct. at 911.

The fourth and final sentence of the provision, and the one upon which the County stakes its entire argument, emphasizes the importance of an employer's intention to pay its employees on a "salary basis" for purposes of using the "window of correction." That sentence, which begins by stating, "[o]n the other hand," cannot be read without reference to the two sentences that precede it. *See* 29 C.F.R. 541.118 (a) (6). And when these sentences are read together, it becomes manifest that only when an employer has demonstrated an intention to pay its employees on a "salary basis," which cannot be shown when there is an actual practice of making impermissible deductions from pay, is the "window of correction" available. The two kinds of deductions referenced in the latter sentence – a deduction that is "inadvertent" or one that "is made for reasons other than lack of work" – do not alter this overriding principle.[6]

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[6] The "window of correction" regulation simply does not support the argument that, regardless of the number of deductions "made for reasons other than lack of work," the "window" is available. Both the structure and the content of the regulation refute this contention. It is worth noting in this regard that the "window of correction" regulation discusses deductions in the plural when pointing to a situation where there is no intent to pay on a "salary basis" – "Where *deductions are generally made* when there is no work available, it indicates that there was no intention to pay the employee on a salary basis." 29 C.F.R. 541.118(a)(6) (emphasis added). Whereas the regulation discusses a singular deduction when demonstrating a situation where there is an intent to pay on a "salary basis" – "On the other hand, where *a deduction* not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost." *Ibid.* (emphasis added). The Secretary does not here

Policy considerations also support the Secretary's position. Exemptions to the dictates of the FLSA, such as the section 13 (a) (1) exemption from paying overtime compensation, are to be construed narrowly against the employer attempting to utilize them. *See Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Therefore, the "window of correction," which allows an employer to preserve the section 13 (a) (1) exemption, should be interpreted narrowly. The Secretary's reading of the "window" comports with this general principle.

Moreover, permitting the "window of correction" to be used without regard to the number of impermissible deductions taken under the "salary basis" test, as long as those deductions were "made for reasons other than lack of work" and the employer reimburses employees for those deductions and promises future compliance, would render the "salary basis" test virtually meaningless.[7] Under this scenario, an employer would be able to treat its otherwise exempt "executive," "administrative," or

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propose what specific number of impermissible deductions for a class of employees is necessary to subject the pay of an employee within that class to reduction under the "salary basis" test as set out in *Auer*. This is a factual determination best left to the trial courts. However, the undisputed facts of this particular case clearly indicate that employees' pay was "subject to reduction," thereby closing the "window."

[7] Disciplinary deductions, which are at issue in this case, are necessarily deductions "made for reasons other than lack of work."

"professional" employees as nonsalaried by impermissibly subjecting their pay to reduction, not pay those employees the requisite overtime compensation to which nonexempt employees are entitled under the FLSA, and then wait and see if legal action is initiated against it. If it is, the employer could preserve the exempt status of the entire class of employees whose pay was impermissibly "subject to reduction" under the "salary basis" test merely by reimbursing those employees from whom deductions in pay were actually made, and by promising to comply in the future. An employer could thus retroactively take advantage of the statutory exemption from paying overtime compensation irrespective of how egregiously it flouted the "salary basis" test. The Secretary did not intend to provide employers that engage in a practice of making impermissible deductions under the "salary basis" test with such an escape hatch.[8]

Contrary to the position taken by the County, the Supreme Court's decision in *Auer* is not in any way inconsistent with the Secretary's position as to the "window of correction." In *Auer*, the Supreme Court

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[8] Another possible incongruous result of the County's position is that those employers that actually engage in a practice of making improper deductions under the "salary basis" test "for reasons other than lack of work" would be in a better position than those employers that have a policy which "effectively communicates" to employees that impermissible deductions will be taken, but which have not made any such deductions. Since the "window of correction," by its terms, corrects only actual deductions taken, the employer in the former situation would have the opportunity to restore exempt status for the relevant class of employees, whereas the employer in the latter situation would not have such an opportunity.

addressed the applicability of the "window of correction" to the specific facts of that case – a one-time impermissible disciplinary deduction. It did not address the issue before this Court – the applicability of the "window of correction" to a situation where numerous impermissible disciplinary deductions have been made pursuant to an established policy allowing for such deductions. Given the one-time impermissible disciplinary deduction with which it was faced, the Supreme Court agreed with the Secretary's position, advanced in her amicus brief, that the "window" should apply. The Court did not take issue with the Secretary's statement that the "window of correction" should not be available "when an employer engages in a pattern of improper deductions," Amicus Brief of the United States in *Auer* at 15. Nor did the Court disagree with the statement of the Eighth Circuit, whose judgment it affirmed, that "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions from compensation." *Auer*, 65 F.3d at 711.

The Supreme Court recognized the importance of an employer's intention to pay employees on a "salary basis" with respect to the availability of the "window of correction." In referring to the Secretary's "window of correction" regulation, it first pointed to that part of the provision stating that the "window" is not available if deductions inconsistent with the "salary basis" test are made in circumstances indicating a lack of intent to pay the employees on a "salary basis." *See Auer*, 117 S. Ct. at

912.[9] The Court proceeded to state that "*[c]onversely*, 'where a deduction not permitted by [the salary-basis test] is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost.'" *Ibid.* (quoting 29 C.F.R. 541.118 (a) (6)) (emphasis added). Thus, the Supreme Court recognized the necessary connection between an employer's intention to pay on a "salary basis" and the availability of the "window of correction." The Court's conclusion that the one-time impermissible disciplinary deduction in *Auer*, though not inadvertent, did not foreclose the availability of the "window of correction" is unremarkable and is totally consistent with the Secretary's position.

Like the Supreme Court in *Auer*, the Ninth Circuit recently held that the "window of correction" is available to an employer that makes a one-time impermissible disciplinary deduction. *See Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997). As the Supreme Court did in *Auer*, the Ninth Circuit emphasized the importance of an employer's intention to pay on a "salary basis" before the employer can avail itself of the "window of correction." Thus, in discussing the "window," the court stated that the "FLSA provides a 'window of corrections' defense to employers who *unintentionally* violate the salary basis test." *Childers*, 120 F.3d at 947 (emphasis added). The

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[9] Significantly, the Court spoke broadly of a lack of intent to pay on a "salary basis"; it did not state that only an employer which makes deductions when no work is available demonstrates the absence of such an intent. *See Auer*, 117 S. Ct. at 912.

court of appeals, quoting from the district court's decision which it affirmed, stated "that the City's suspension of one exempt employee in ten years reflected a 'decidedly unintentional failure to adhere to § 541.118 (a)'s requirements,' entitling them to the widow of corrections defense." *Ibid.*

Moreover, a recent decision of a district court in New York specifically "reject[ed] defendant's argument that, no matter what violations it may have committed, it is entitled to avail itself to the window of correction and can thereby bar plaintiffs' claims by preemptively reimbursing any potentially improper deductions." *Hoffmann v. Sbarro, Inc.*, No. 97 Civ. 4884 (SS), 1997 WL 666292, at *6 (S.D.N.Y. Oct. 23, 1997). The court stated that "while the Supreme Court [in *Auer*] did not reach the more difficult issue of what to do in cases of multiple, recurring violations [as opposed to the one unusual improper disciplinary deduction it had before it], the Secretary of Labor, in its Amicus Brief in *Auer*, explained in no uncertain terms that it does not view the window of correction as available in such circumstances." *Id.* at *7. The court noted that this interpretation by the Secretary is entitled to no less deference than that accorded by the Supreme Court to her interpretation of the meaning of "subject to reduction," and to her conclusion that the "window" does not require immediate reimbursement. *Ibid.* Finally, the district court, while deferring a factual determination as to whether there was a "pattern" of improper deductions, concluded "that the Secretary's interpretation, providing that the window of correction is unavailable to employers that have engaged in a 'pattern' of improper deductions, rationally expresses the view that such employers lacked

a 'bona fide intent' to treat their employees as exempt." *Ibid. But see Davis v. City of Hollywood*, 120 F.3d 1178, 1180 (11th Cir. 1997) (without reference to the Secretary's interpretation of the "window of correction" as set forth in her amicus brief in *Auer*, the court held that six impermissible disciplinary deductions from 1986 to the present entitled the employer to use the "window" because the deductions were "for reasons other than lack of work"); *Arrington v. City of Macon*, 973 F. Supp. 1467, 1474 (M.D. Ga. 1997) (also without reference to the Secretary's interpretation of the "window," the court, in the contest of the city having made occasional improper deductions pursuant to a settled policy, concluded that "the fact that an employer intentionally makes a deduction from an exempt employee's paycheck which is impermissible under the FLSA does not defeat its right to utilize the window of correction so long as the deduction was made for reasons other than the lack of available work").

The district court in *Hoffmann* followed the Supreme Court's direction regarding the deference owed to the Secretary's interpretation of her own regulations, and reached the correct result as to the "window of correction." The "window" is simply not available to an employer, like the County, that has made recurring deductions inconsistent with payment on a "salary basis."

CONCLUSION

For the foregoing reasons, the Count's motion for summary judgment regarding the availability of the "window of correction" should be denied, and plaintiffs'

motions for summary judgment in connection with that same issue should be granted.

Dated: November 12, 1997

Respectfully submitted,

MARVIN KRISLOV
Deputy Solicitor for
National Operations

STEVEN J. MANDEL
Associate Solicitor

/s/ Paul L. Frieden
PAUL L. FRIEDEN
Attorney

U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-2716
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(202) 219-7600

CERTIFICATE OF SERVICE

I certify that on November 12, 1997, the foregoing amicus brief of the Secretary of Labor was sent by overnight delivery to:

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/s/ Paul L. Frieden
PAUL L. FRIEDEN
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U.S. Department of Labor
(202) 219-7600

CITY OF HOLLYWOOD, FLORIDA
GROWTH MANAGEMENT
DEPARTMENT MEMORANDUM

DATE: April 16, 1992 FILE: DLPPERS

TO: Dale Lee,
Chief Building Official

FROM: Growth Management Director

SUBJECT: ATTACHED DISCIPLINARY REPORT

The following comments are submitted in support of the violations of Employment Rules and Regulations listed on the attached disciplinary report:

E – VEHICLE USAGE –

1 – When advised by me that a report had been received that your assigned City vehicle (#1401) had been parked in a handicapped parking space after working hours in a shopping center in the City of Wilton Manors, your initial response was that you could not remember whether you had used the car for private purposes, but would never park in a handicapped space.

When I indicated that I did not feel that such a response was acceptable since the date of the reported violation was only two days prior, you said that you would never park in a handicapped space, but that you occasionally have used your assigned City vehicle to go from your home to the store for light shopping.

Following our discussion I have made additional investigation into the source of

the above referenced report. This investigation has revealed that a member of the Civil Service Board for the City of Wilton Manors had reported to the Wilton Manor City Manager, that on the evening of March 23rd he had been unable to utilize a handicapped parking space for which he is qualified to use, in front of the Publix in Wilton Manors, and further that one of the cars utilizing the available handicapped spaces was a City of Hollywood vehicle, number 1401.

In my opinion your use of your assigned vehicle for private use is clearly a violation of section E-1 of the Employment Rules and Regulations. This violation is even more serious in light of your acknowledgement to me that such use is not allowed.

Q – INCOMPETENCE –

1 – Your failure to conform to the acknowledged standards applying to your use of your assigned City vehicle violates section Q-3 of the Employment Rules and Regulations.

2 – The fact that you had been previously orally counseled regarding a previous use of your assigned vehicle constitutes a violation of section Q-7 of the Employment Rules and Regulations.

S – RULES PERTAINING TO CITY PROPERTY –

1 – The unauthorized use of your assigned vehicle for your private use violates section S-D of the Employment Rules and Regulations.

V – RULES PERTAINING TO IMPROPER CONDUCT –

1 – The parking of your assigned City vehicle in a designated handicapped parking space is clearly an act unbecoming a City employee which adversely affects the City of Hollywood's reputation. This act which violates section V-B of the Employment Rules and Regulations is especially grievous when the violator is a City staff member with direct responsibility for supervising the requirements for handicapped parking.

W – RULES PERTAINING TO MISCELLANEOUS AREAS –

1 – The unauthorized use of the assigned vehicle violates section W-J in light of previous counseling regarding appropriate conduct within a City assigned vehicle and your acknowledgment that you knew you should not use the vehicle for private purposes.

This disciplinary report is intended to communicate the unacceptable nature of your performance as cited above. I am therefore by this memo advising you of your suspension for two working days without pay, commencing on Thursday, April 23rd at 8:00 a.m. and ending Friday, April 24th at 5:00 p.m. This two day suspension is in my opinion properly responsive to the nature of the violations, particularly for an employee functioning at the high level of responsibility assigned to your position. It is my hope that you will concur in this finding and allow this experience to contribute to an improved level of performance in the future. You should be aware that any

further violations will result in additional disciplinary action including possible termination.

CITY OF HOLLYWOOD, FL

INTER-OFFICE MEMORANDUM

DATE: October 29, 1991 FILE: 91-NI-147
TO: Sandra Kichler, Director
Community Development Division

FROM: Cynthia A. Diemer, Director
Dept. of Neighborhood Improvement

SUBJECT: Inadequate Performance of Job Responsibilities

During the week of September 13, 1991, several members of your staff had asked to speak to me regarding the general working conditions in your office. Their complaints were primarily about your style of management, the displaced decision making, the lack of consistency in your actions and training methods.

Your style of management has been described as dictatorial, demeaning, officious, demanding, and difficult to communicate with. You have taken a casual and non-technical approach to providing adequate training to your staff. Due to the lack of training or the inconsistencies of your demands, coupled with your management style, the staff has become unduly stressed which has resulted in low morale.

Low morale and a negative working environment has a negative impact on productivity and hinders the ability and confidence to perform of staff members. As Division Head and Director, it is your responsibility to provide a fit environment. A fit environment promotes efficiency, effectiveness, and productivity in a sound and professional manner.

These complaints are not just "in passing or casual" in nature but represent chronic complaints that have been documented in the past, are still being raised, and documented by my own observations.

On September 26, 1991, we discussed some issues surrounding staff's complaints. While initially you did not accept any responsibility for staff's complaints, you later stated you don't comprehend their feelings. You claim to be supportive, willing and helpful.

There have been several incidents that have raised questions about your knowledge or abilities to serve as Director. These incidents are as follows:

1. *INCONSISTENCY* – Property Standards Specialist

On December 17, 1990, you were given a written warning regarding the performance of your duties surrounding the sub-recipient funding of the Property Standards Specialist. You had agreed and supported the funding for this position and its benefit to the community at a staff meeting. Yet at the CDAB meeting, you were specifically asked to state your recommendations and you stated you did not want to make recommendations. Yet later in the meeting you offered a recommendation for another sub-recipient and did not offer support for the Property Standard Specialist Program. This shows inconsistency in your style and in your leadership.

2. *INCOMPETENCE* – Stanley Cohen case

On July 30, 1991, you were involved with the Cohen Rental Rehab Loan case (involving two properties) that

was brought before the City Commission for refinancing approval. During this entire incident, you repeatedly stated you were confused, you didn't understand the proceedings taking place about the mortgage positions, refinancing, etc. You also were reluctant to speak before the City Commission to discuss the facts surrounding this case because of *your alleged* lack of understanding. Your entire demeanor was inexplicable during the handling of this case. You were visibly shaken and lacked confidence and composure.

I find it impossible to believe you have administered these programs, for several years, here and outside Hollywood and yet do not fully understand all elements of the program or procedures. If you truly do not understand, you may not be suitable as the Director. If you are knowledgeable, your behavior in this case is unacceptable and inexcusable.

3. *IMCOMPETENCE & INSUBORDINATION* – Ed Cannon case

On September 30, 1991, Ed Cannon had called to make an appointment with me to discuss his Rental Rehabilitation Loan application for his property located at 1914 Madison Street. During the prior month, Mr. Cannon had complied with all the known requirements in his attempt to secure funding. During case review, you advised Jed Baumwell and Lou Petrosino that his application required a certified appraisal.

Mr. Cannon spoke to you to discuss the need for a certified appraisal and also discussed the financial soundness of his property, as it relates to this loan program. He

asked you specifically to state where a certified appraisal is required and you could not because "the language is vague and subject to interpretation". Mr. Cannon's point was that the requirement for a certified appraisal was not part of the original loan requirement and he felt he had done everything to satisfy the "known" program requirements.

His appointment with me was set for October 1, 1991, and the day prior, I asked you about the case. You stated you had never seen the file and didn't know about it yet you required a certified appraisal of the property. You also stated that you never handled the Rental Rehab Program and didn't know much about it. I specifically instructed you to personally review the file with Jed and make your recommendations. I repeated it to avoid any misunderstandings.

The following morning I asked if you had seen the file. You stated you did not. You gave the file to Jed and said, "Handle it." This represents insubordination on your part and will not be tolerated. This entire incident is filled with inconsistencies in your direction of this program and of your staff. It could also reflect your professed lack of knowledge about the program which is a required job skill.

4. *EXCESSIVE DOCUMENTATION AND DISPLACED DECISION MAKING* –

An example of excessive documentation on a minor issue involves the Medical Waiver of Need Form. This form was originally created to document a client's medical

need for air conditioning benefits. The medical need process has progressed to the point of requiring a physician to review highly technical specifications of mechanical equipment and accessories to support his medical recommendation for the patient to have air conditioning benefits.

HUD regulations classify air conditioning as an eligible activity and do not require medical conditions to qualify the client. Your local policy would be adequately met by the physician's recommendation. The requirement for a physician to review highly technical material, to substantiate his medical recommendation, is unnecessary and burdensome to the physician. His role is to practice medicine, your role is obtaining documents to support your requirement. This over-documentation reflects your displaced decision making and appears excessive relative to the benefit being provided. This form of over-documentation has a negative impact on the efficiency and effectiveness of the Rehab client processing.

Additionally, forms and documents are within your authority to approve in order to meet local policy. To require staff from an outside HUD office to review your forms, specifically, the Medical Waiver of Need form, is unnecessary and another example of displaced decision making on your part.

You have the authority to approve loans, processed under HUD guidelines. The use of a Loan Committee to approve loans may represent another example of displaced decision making. The members of finance, building, and planning each have their own responsibilities

and the need to participate in this approval process takes them away from those duties.

5. LEADERSHIP & TRAINING

You do not provide adequate training or instructions on new assignments to your subordinates. Your professed style of training involves briefly indicating where the files, documents, or references are and directing the employee to "get into it, read it, and write down any questions you may have . . . " However, your staff has become frustrated and stressed at this training method. Employees have erred and claimed to have been berated for their lack of knowledge. Your training methods are apparently inadequate and ineffective. It fosters frustration and lack of confidence in the employee.

Employee morale is extremely low. Dedicated and experienced staff, with years of satisfactory service, have become unduly stressed in their work environment and their inability to communicate effectively with you. This has apparently been due to your lack of leadership and inter-personal skills.

It is your responsibility to create an efficient, effective and productive environment. Your previous performance evaluations have consistently documented these deficiencies and the current complaints reflect no improvement on your part in these areas.

CONCLUSION

It appears that you have been unable to deal effectively with subordinate staff on a supervisory level. Weaknesses

documented in previous performance reviews and supported by your style of training are contributing factors. These factors have had a negative impact on the work environment, morale, and productivity.

It further appears that you are unable or unwilling to make direct decisions and have used layers of documentation, from various divisions and departments, to dilute your responsibility for any potential errors in judgment. As Director, you must always maintain full responsibility and accountability for the operation of your division; it cannot be deflected.

Due to the serious nature of this memorandum and since the previous counseling and written documentation have not improved your performance to an acceptable level, you will receive a three (3) day suspension. Should your performance continue to be inadequate or remain unacceptable, appropriate action will be taken.

Your three day (3) suspension, without pay, will take place at 8:00 A.M. on Wednesday, October 30 through 5:00 P.M. on Friday, November 1, 1991.

CITY OF HOLLYWOOD, FLORIDA
INTER-OFFICE MEMORANDUM

TO: Alan Bunn
Golf Course Superintendent

DATE: September 17, 1990 FILE: CM 90-184
SUBJECT: AMENDED NOTICE OF SUSPENSION

FROM: Irving Rosenbaum, D.P.A. REFERENCES:
City Manager

You received disciplinary action on September 13, 1990 to be suspended without pay for a period of one (1) week for violation of rules pertaining to improper conduct as an employee. A copy of that notice was given to you with your acknowledgment of such. I have determined that the seriousness of this situation warrants more stringent discipline; accordingly, I am directing that your suspension without pay be increased from five (5) to ten (10) days.

Your appeal rights to the Civil Service Board remain unchanged.

SJ/IR/rsn

cc: S. "Pepper" Jackson, General Assistant City Manager
Mike Rozos, Director of Recreation and Parks
Alan Koslow, City Attorney
Herbert Chernov, Personnel Director

DISCIPLINARY REPORT

September 13, 1990
date

TO: Alan Bunn, Superintendent of Golf

DEPT.: 1310 DIVISION: 4301

CAUSE FOR DISCIPLINARY ACTION: During your supervision of Orangebrook Golf Course, July 20, 1990, you approached and inquired of three Golf Course employees, [names omitted] as to why they were sitting under a tree when their work was not completed. During your comments, you made reference to another employee, [name omitted] who was sitting under another tree approximately 200 yards away as "that nigger under that tree". As we discussed, there is no excuse for a City Employee making this remark, especially a supervisor. Even though you regret making this remark and have apologized, it should not have occurred.

Your actions are in violation of the City of Hollywood Rules and Regulations:

(See attached)

DISCIPLINARY ACTION TAKEN:

[ ] WARNING [X] SUSPENSION
[ ] TERMINATION [ ] DEMOTION

- [ ] FIRST REPORT
- [ ] SECOND REPORT
- [ ] THIRD REPORT

Be advised that in case of suspension, demotion, or termination only, you have a period of ten (10) calendar days from date of this notification to file an appeal with the Civil Service Board of the City of Hollywood, Florida.

/s/ Illegible
SIGNATURE –
DEPARTMENT HEAD

NOTIFICATION

The undersigned employee hereby acknowledges that he/she received this notice on September 13, 1990 . This signature in no way indicates that the employee concurs with any statement contained in the notification.

/s/ Illegible
SIGNATURE – EMPLOYEE

COPY TO: EMPLOYEE
CITY MANAGER
CITY ATTORNEY
PERSONNEL ✓ FILE
DEPARTMENT
UNION

- The issuance of three (3) DISCIPLINARY REPORTS resulting in Warning or Suspension will be cause for termination of employment.

Alan Bunn
Superintendent of Golf

Attachment to Disciplinary Report
September 13, 1990

V. RULES PERTAINING TO IMPROPER CONDUCT

a. Abuse of fellow employees or of the public.

b. Conduct unbecoming an employee or adversely affecting the City's reputation.

c. Malicious use of profane, abusive or threatening language to others.

As a result of your inappropriate action, you are being suspended without pay for five (5) working days from September 16-20, 1990.

Any future occurrence of this type of conduct will result in a more severe disciplinary action up to and including termination.

Be further advised that pursuant to Section 9.08 of the City Charter you have the right to appeal this suspension to the Civil Service Board within ten (10) calendar days from your receipt of this letter by filing a Notice of Appeal together with an explanation of defence at the office of the Civil Service Board, Room 203, City Hall. In the alternative, you may utilize the grievance and arbitration procedures provided by the Union Contract.

/s/ Illegible
SIGNATURE –
DEPARTMENT HEAD

/s/ Alan Bunn
SIGNATURE – EMPLOYEE

CITY OF HOLLYWOOD, FLORIDA
INTER-OFFICE MEMORANDUM

TO: Chris Cutro,
Director of Planning And Zoning

/s/ Robert L. Davis
Robert L. Davis

FROM: Growth Management Director

DATE: October 27, 1989 FILE:

SUBJECT: Unsatisfactory performance of administrative duties

REFERENCES:

I was **OUTRAGED** yesterday to learn that five members of your Division staff were being deprived of earned merit pay increases due to your failure to complete and file the necessary paperwork in a timely manner. These delays which range up to as much as six months were imposed on some of the same staff members who were making an all out effort to compensate for the late start-up of the City's comprehensive Plan preparation. Their reward for their successful effort was a withholding of earned salary – hardly an incentive for extra effort in the future.

This failure to perform on your part represents an extremely poor understanding of good personnel management. It is even worse following so soon after my counseling of you in connection with your most recent performance evaluation which called for you to complete

the necessary performance evaluations on all Division personnel within three months.

I am simply at a loss to understand how you could allow these employees to "twist in the wind" waiting for their anticipated raises. You found the time to file the necessary paperwork to allow you to attend the State Planning Conference and schedule your vacation. This leads me to the only logical conclusion – that lack of priority of your effort continues to be a problem. It results from poor work habits, work distribution and use of time and constitutes **A MAJOR DEFICIENCY IN YOUR PERFORMANCE WHICH MUST BE QUICKLY CORRECTED**!

Based upon the above I hereby advise you of the following:

1. – You are suspended without pay commencing at 8:00 A.M. Monday November 6, 1989 and ending at 5:00 P.M. Tuesday November 7, 1989.

2. – You are to be in my office Monday at 9:00 A.M. November 13, 1989 prepared to review your previous Performance Evaluation of 4/12/89 with attention to how your performance has improved or deteriorated since that date.

cc: Irving Rosenbaum,
City Manager

George Keller,
Assistant City Manager

CITY of HOLLYWOOD

[LOGO]——————————————————HGMD

FLORIDA

GROWTH MANAGEMENT DEPARTMENT

GEN. JOSEPH W. WATSON CIRCLE
• P.O. BOX 229045
• ZIP 33020-9045
• PHONE (305) 921-3647
ROBERT L. DAVIS AICP • DIRECTOR

March 24, 1989

Dear Mr. Deyo:

Please be advised that I am ordering you suspended without pay from your position as Chief Building Official for a period of two days. Specifically you are suspended for the following days: Tuesday, March 28th and Wednesday, March 29th. You are to report back to work if so scheduled on Thursday March 30th.

This action authorized by the Hollywood Civil Service Ordinance Section 9.08, is being taken against you based upon the following facts and circumstances:

In connection with the evaluation of complaints and charges from Clerk Typist Anke Aldag. I reviewed the personnel record of Ms. Aldag. That review listed only one written reprimand for an instance of tardiness. My discussion with you and other members of the division, however, indicated a long existing tendency on Ms. Aldag's part to be obstinate, rebellious and abusive in both her actions and language which included frequent profanity. In response to my discussions with you you

produced a separate private file of recorded instances dating back to 1987 in which you verified that Ms. Aldag's performance had been unacceptable. The private file contained a memo regarding a December 29, 1988 verbal reprimand and oral counselling of Ms. Aldag, but this confrontation was never documented or officially placed on her record although the instances precipating [sic] your meeting were extremely serious including reference to a fight or bitter argument that had erupted within the public area of the office. The private file likewise contained a summary of a November 18th meeting at which a number of [illegible] people were indicated to be in attendance at which you advised all personnel of the need to control their actions, body language and relationship to one another particularly in public. The private file further contained two memos from Sandy Pedro, Chief Clerk setting forth observed unacceptable performance on Ms. Aldag's part which were disruptive to fellow employees. The second memo from Ms. Pedro dated December 28, 1988 specifically requested that you suspend Ms. Aldag for 3 days based upon her observations.

In light of the above record of obvious and repetitive substandard performance by an employee under your supervision it is difficult for me to understand why necessary progressive disciplinary actions were not undertaken in order to help Ms. Aldag to either correct her performance or otherwise be dealt with appropriately. It is my further conclusion that your failure to follow-up on your own conclusions as a division head and those in responsible positions on your staff represents unacceptable performance for a division chief and a violation of

the City of Hollywood Employment Rules and Regulations set forth below and on the attached disciplinary report. It is my further conclusion that this failure to take appropriate administrative control of your division contributed significantly to further disintegration of the morale in your division and led almost unavoidably to further abuse by Ms. Aldag and other members of the division.

Based upon the above it is my determination that your performance as herein described was totally unacceptable, disruptive to the normal functioning of the Building Inspection Division and in violation of the "City of Hollywood Employment Rules and Regulations" as revised 11/88 and set forth below and on the attached disciplinary report.

Specifically the rules you have violated are as follows:

1. Section Q: Incompetence
    1. Lack of knowledge of the application of regulations to be administered.
    2. Inability to perform assigned tasks.
    3. Failure to conform to work standards established for the members position.
2. Section W – Rules pertaining to miscellaneous areas.
    D. Negligence
    F. Substandard quality of work/job performance.

It is my hope that this disciplinary action will help you to reevaluate your future performance with this department so that we can better serve the citizens of this city. Your failure to do so and any future reoccurrences of actions

such as outlined above, will lead to further disciplinary action including consideration of possible dismissal.

Prior to your suspension without pay you have the right to meet with me to discuss why this action should not be taken against you.

Also, be advised that pursuant to Section 9.08 of the Hollywood Civil Service Ordinance, you have the right to appeal this suspension to the City's Civil Service Board within ten (10) calendar days of your receipt of this notice by filing a Notice of Appeal, together with your explanation of defense, at the office of the Civil Service Board, Room 132, City Hall.

Sincerely,

/s/ Robert L. Davis
Robert L. Davis, AICP
Director of Growth Management

DISCIPLINARY REPORT

October 27, 1988
date

TO: Don Peoples

DEPT.: Utilities

DIVISION: Wastewater Treatment

CAUSE FOR DISCIPLINARY ACTION: Violation of the following City of Hollywood Rules and Regulations:

Q. INCOMPETENCE

all employees shall maintain sufficient competency to properly perform their duties and to assume the responsibilities of their positions. They shall perform their duties in a manner which will tend to establish and maintain the highest standards of efficiency in carrying out the functions and objectives of the Departments.

Incompetence may be demonstrated by:

1. A lack of knowledge of the application of regulations to be administered.

3. The failure to conform to work standards established for the member's position.

X. RULES PERTAINING TO MISCELLANEOUS AREAS

DISCIPLINARY ACTION TAKEN: (Continued)

[ ] WARNING [X] SUSPENSION [ ] TERMINATION
[ ] DEMOTION

•[ ] FIRST REPORT
•[ ] SECOND REPORT

•[XX]THIRD REPORT

Be advised that in case of suspension, demotion, or termination only, you have a period of ten (10) calendar days from date of this notification to file an appeal with the Civil Service Board of the City of Hollywood, Florida.

/s/ illegible
SIGNATURE-DEPARTMENT HEAD

NOTIFICATION

The undersigned employee hereby acknowledges that he/she received this notice on ___.

This signature in no way indicates that the employee concurs with any statement contained in the notification.

/s/ Don E. Peoples
SIGNATURE – EMPLOYEE

COPY TO:

EMPLOYEE
CITY MANAGER
CITY ATTORNEY
PERSONNEL
DEPARTMENT
UNION

- The issuance of three (3) DISCIPLINARY REPORTS resulting in Warning or Suspension will be cause for termination of employment.

Don Peoples
October 27, 1988
Disciplinary Action

> The following examples of employee behavior related to various inappropriate employee actions are strictly prohibited:
>
> F. Substandard quality of work/job performance.

The facts which support these charges are as follows:

Beginning on July 19, 1988 you entered incorrect data on the Wastewater Treatment Plant Operations Analysis Sheet. On page one of this form, in the column intended for the plant effluent flow, you began entering instead the combined flow from the plant, Davie/Cooper City, and the Water Plant. Prior to this date, from December, 1987, through July 18, 1988 you had been entering the correct data in this column. You have failed to give a satisfactory explanation for making this error. Furthermore, you failed to inform anyone, including the Shift Foreman who enters this data in your absence, that you were making this change.

As the Operations Superintendent of the Plant, and as a certified Wastewater Treatment Operator, you should be sufficiently knowledgeable to determine which figure is required for plant calculations and regulatory agency reports. You should be aware that the plant effluent flow is required to calculate many important parameters. You should also realize that any change in reported data will require a corresponding change in the computer program that utilizes this data.

As a result of your error, incorrect reports were filed with the EPA, FDER, and BCEQCB for a period of three (3) months. In addition incorrect data was supplied to the City Manager, the Utilities Director, the Engineering Department, the consulting engineers, and the Accounting Department. The latter used this incorrect data in billing at least one of the Large User municipalities. Considerable staff time was required to prepare and issue revised reports for the three months and to correct the data already entered for the current month. Your error reflected on the professionalism of this Department.

This error clearly demonstrated a lack of knowledge of the regulations, substandard job performance, and a failure to conform to the work standards and the responsibility inherent in your position. You have previously been counseled on two occasions for similar violations. Therefore, you are to be suspended for five (5) days. The dates of your suspension will be determined by the Wastewater Treatment Plant Manager.

Any future similar violations will result in further disciplinary action which may include demotion or termination.

CITY OF HOLLYWOOD, FLORIDA
INTER-OFFICE MEMORANDUM

TO: Vito Splendorio
Fire Chief

FROM: Patrick J. Mason
Safety Supervisor

DATE: October 30, 1987

SUBJECT: Preventable Accident

REFERENCES:

FILE: IS-87-149

On May 27, 1987, you were involved in an accident. It has been determined that you did not exercise every reasonable precaution to prevent this accident/injury from occurring, therefore, based on the information we have at hand, this accident/injury is determined to be preventable.

Recommended Action: Written notice in Personnel file, loss of one vacation bonus day, and two days suspension.

An appeal of this recommendation may be filed by the employee or the department/division head by notifying the Safety Supervisor in writing within ten (10) calendar

days from the date of this notice. If a timely appeal is not made, this recommended action becomes final.

cc: Department

June 3, 1987

120-A-87

9/4/86	9/4/87	5/27/87	3:43 XX
			921-3291

City of Hollywood
P.O. Box 2207
Hollywood, Fla. 33022 Patrick J. Mason 8-5
921-3291

N. 25th Ave & Sheridan St.

While pulling into flow of traffic, view was obstructed, Chief Splendorio made contact with civilian vehicle.

* * *

CITY OF HOLLYWOOD, FLORIDA
INTER-OFFICE MEMORANDUM

TO: William Clark
Division Chief

FROM: Walter J. Battaglia
Deputy Chief

DATE: July 8, 1986

SUBJECT: Preventable Accident of April 23, 1986

REFERENCES:

FILE: FR-86-140

This is to advise you of the loss of your vacation Bonus Day as required by the provision stipulated in the Employee Safety Handbook.

This loss will complete the action recommended and approved by Fire Department Staff and the City of Hollywood Safety Division as referred to in Memo IS-86-90 and related documents.

WJB/nb
Attach.

cc: Leon Davis, Local 1375
Finance Department

HOLLYWOOD FIRE AND RESCUE DEPARTMENT

[LOGO]

City of Hollywood, Florida

Office of
JAMES WARD
Chief of Fire
921-3448

MAIL TO:
3401 Hollywood Boulevard
Hollywood, Florida 33021

BY HAND DELIVERY

January 18, 1983

Mr. Vito Splendorio

Re: Suspension of Employment

Dear Mr. Splendorio:

On January 12, 1983, the Motorola radio assigned to you was stolen. In view of the fact that the security of this radio was your responsibility, you are hereby being suspended for twenty-four (24) hours with loss of pay. This suspension is to be served by the loss of twenty-four hours compensatory time.

Pursuant to Section 8 of Ordinance 78-1, of the City of Hollywood, Civil Service Act, you have the right to appeal this suspension to the Civil Service Board within ten (10) calendar days from your receipt of this notice, by filing a Notice of Appeal with the Board together with your explanation of defense, at the Office of the Civil Service Board, Room 23, City Hall Annex.

Yours truly,

/s/ James Ward
James Ward
Chief

JW/nbm

cc: James Chandler, City Manager
Herbert Chernov, Personnel Director
Nancy Cousins, City Attorney
Salvatore Velardi, Chairman, Civil Service Board
Doug Macready, President, Local #1375

CITY OF HOLLYWOOD, FLORIDA
POLICE DEPARTMENT
DISCIPLINARY ACTION FORM

TO: Sam D. Martin, Police Chief

DATE: November 5 1980

NAME OF MEMBER: Capt. R.S. Davis

BADGE NO. 0508

NATURE OF INCIDENT: Motor Vehicle Accident found to be PREVENTABLE.
Case #80-70719
Date of accident: 9-15-80

RECOMMENDED DISCIPLINE: Loss of one (1) bonus day.

SUBMITTED BY: /s/ R.S. Mowers
Capt. R.S. Mowers
Police Accident Review Board

APPROVED BY: /s/ R.S. Mowers

/s/ Robert S. Davis
ACKNOWLEDGEMENT OF MEMBER

[ ] AGREE [ ] DISAGREE

IMPOSED DISCIPLINE:

[X] AFFIRM [ ] DISAFFIRM [ ] MODIFY

/s/ illegible
POLICE CHIEF DATE

/s/ Robert S. Davis
MEMBER DATE

Supreme Court, U.S.
FILED
APR 17 1998
CLERK

No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RELEVANT STATUTES AND REGULATIONS[1]

29 U.S.C. § 255. Statute of Limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wage, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Avis Act –

> (a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; * * *

5 U.S.C. § 706. Scope of Review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> > (1) compel agency action unlawfully withheld or unreasonably delayed; and

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[1] The Petitioners have failed to include certain statutory provisions relevant to the arguments raised in the Petition and in this Brief in Opposition as required by Sup.Ct.R. 14. Accordingly, the Respondent is supplementing the initial presentation of relevant statutory and regulatory authorities.

(2) hold unlawful and set aside agency action, findings and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE[2]

The Petitioners were high-level management employees of the City of Hollywood ("City") who were designated by the City as exempt under the Fair Labor Standards Act ("FLSA") pursuant to 29 U.S.C. § 213(a)(1). They were among the highest paid of all City employees during the relevant period. The Petitioners filed suit against the City alleging that employees designated by the City as exempt under the FLSA had actually lost wages as a result of partial-day absences. This claim of deductions for partial-day absences was the only basis alleged by the Petitioners to support their claim that the City had violated the FLSA. Despite extensive discovery, however, the Petitioners were unable to find a single exempt City employee who had wages deducted for absences of less than a day during the period from 1986 through 1994, the time frame relevant to this lawsuit.

While the Petitioners were unable to find any employees, including themselves, who had ever suffered an actual deduction of pay for a partial day absence, the City became aware during the course of trial discovery that an exempt employee had been suspended for a one-week period. As a result of this information, the City immediately initiated an internal audit. During the course of this audit, the City discovered that between 1986 and 1994 there were four instances of suspensions

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[2] References to the Petitioners' appendix shall appear as "P.App. ___" while references to the Respondent's appendix shall appear as "R.App. ___."

for periods of less than a week.[3] In addition to the instance of a one-week suspension, the City also discovered that another exempt employee had been suspended for two weeks. The City employed in excess of one hundred individuals in exempt capacities during the eight-year period.

Immediately upon the discovery of the suspensions, the City invoked the window of correction provided by 29 C.F.R. § 541.118(a)(6), reimbursed the individuals suspended and instituted a policy prohibiting suspensions for periods of less than one week. Several months later, the City broadened its policy, reimbursed the two individuals who had been suspended for week-long periods and entered a blanket policy prohibiting all suspensions, of whatever duration, for exempt employees.[4]

The Petitioners were also unable to establish the existence of any written policies of the City which specifically allow or prescribe disciplinary suspensions for exempt employees. Contrary to the Petitioners' assertion, neither the district court nor the Court of Appeals for the Eleventh Circuit ever made a factual or legal determination that the City had "an established written policy" specifically applicable to exempt employees. The only written policies mentioned by the Petitioners are policies that

---

[3] The Petitioners erroneously state that as many as eight suspensions occurred. (Pet. at 20) This is inconsistent with the facts and the factual findings of the trial court. (P.App. 22)

[4] The reimbursements made to the employees who suffered one- and two-week suspensions were made in an abundance of caution. As noted below, caselaw and Department of Labor opinions state that weeklong suspensions do not destroy the exempt status of employees under the FLSA.

apply generically to all employees, but do not actually state that exempt employees will be subject to disciplinary suspensions. It is perfectly possible for the personnel policies referenced by the Petitioners to be given full effect without drawing the inference that pay deductions are an anticipated form of punishment for exempt employees.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court states that a writ of certiorari will be granted "only for compelling reasons." Among the different reasons upon which the Court may base the issuance of a writ of certiorari are (1) conflict between the decision of a United States court of appeal and relevant decisions of this Court, Sup.Ct.R. 10(c); (2) conflict between the decisions of the United States courts of appeal with respect to the same important matter, Sup.Ct.R. 10(a); and (3) a decision rendered by a United States court of appeal with respect to an important question of federal law that has not been, but should be, settled by this Court, Sup.Ct.R. 10(c).[5] A petition for a writ of certiorari is "rarely granted" merely to have this Court review erroneous findings of fact or the misapplication of a properly stated rule of law. Sup.Ct.R. 10.

As argued herein, the Petitioners have not satisfied the requirements for invoking this Court's certiorari

[5] Other bases for certiorari review are articulated in Rule 10, but do not appear to serve as appropriate bases for review under the facts of this case.

review. At best, the Petitioners are asking this Court to reconsider the factual findings of the trial court with respect to the existence of certain written personnel policies or to "correct" the Eleventh Circuit's purported misapplication of the window of correction, a rule of law that was correctly stated below.

I. THE ELEVENTH CIRCUIT'S DECISION IN *DAVIS* DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUITS[6]

A. *Davis* Is Consistent With *Auer*

The Eleventh Circuit's decision in *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997) is completely consistent with this Court's decision in *Auer v. Robbins*, 117 S. Ct. 905 (1997). The Petitioners appear to concede, based upon their reliance on *Auer*, that the window of correction is still available to an employer despite the existence of an actual disciplinary suspension and a general departmental policy that allows for the possibility of suspension for all employees. They argue, however, that *Auer* did not address the factual scenario in the instant

---

[6] The first question presented by the Petitioners, as phrased, is a non-issue, insofar as there has been no factual finding in the record below that the City ever had "an established written policy" which permitted "repeated improper deductions." Moreover, as argued below, the pertinent inquiry is not whether "an established written policy existed," but rather whether such a policy "effectively communicated" to exempt employees that pay deductions were an anticipated form of punishment. As such, the first question presented by the Petitioners cannot be extracted from the opinion below or supported by the record.

case. (Pet. at 17) Their argument, therefore, that *Davis* is necessarily inconsistent with *Auer* is without merit.[7]

Auer resolved authoritatively the question of whether the term "or" in 29 C.F.R. § 541.118(a)(6) is to be read disjunctively, as decided in *Davis*, or conjunctively, as argued by the Petitioners before the trial court and later on appeal. *Auer* concluded that the window of correction is applicable to an employer who has made certain improper deductions if the deductions were made *either* "inadvertently" *or* "for reasons other than lack of work." *Auer*, 117 S. Ct. at 912. The *Davis* court specifically acknowledged the ruling in *Auer* and concludes, by necessity, that the window of correction can be applied by the City where the deductions were made inadvertently *or* "for reasons other than lack of work." *Davis*, 112 F.3d at 1181.

Davis is also consistent with *Auer* with regard to the *nature* of deductions that would permit an employer to apply the window of correction. In *Auer*, this Court cited to the Secretary of Labor's regulatory interpretation which permits the use of the window of correction unless there exists, as to exempt employees, "a clear and particularized policy – one which 'effectively communicates' that deductions will be made in specified circumstances." *Auer*, 117 S. Ct. at 911. The policy at issue in *Auer* consisted of a "manual" which "nominally covered" all department employees, regardless of exempt status. The policy further specifically provided that disciplinary deductions

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[7] Not surprisingly, the Petitioners do not cite any post-*Auer* decisions wherein it is even suggested that *Davis* has created a conflict with this Court's jurisprudence.

in pay could be imposed. *Id.* In *Davis*, the only written documents upon which Petitioners relied to create an "established written policy" as to exempt employees involved general personnel policies that applied to all employees, regardless of their exempt status. Such general policies are identical to those at issue in *Auer* with respect to which the Court permitted the use of the window of correction.

The Eleventh Circuit rendered its opinion in *Davis* "under the facts of this case," and did not urge any broader interpretation or application of its holding.[8] (P.App. 5) In effect, the court in *Davis* failed to find, under the particular facts at issue, that the personnel policies from the various departments "effectively communicated" that pay deductions to exempt employees were an anticipated form of punishment. The City "rules" cited by the Petitioners are precisely the same kind of general policies which *Auer* and the Secretary of Labor found do not "effectively communicate" to exempt employees that they may be suspended as a disciplinary penalty, thereby creating an improper "policy" of suspension. Therefore, the Eleventh Circuit correctly concluded, in accordance with the holding in *Auer*, that the window of correction was available to the City in this case.

In addition, there is no "pattern" of deductions that would establish an "actual practice of making such deductions." Although the factual scenario in *Auer* dealt

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[8] This Court has previously held that it does not grant certiorari to review evidence or to discuss specific factual situations. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

with a single deduction, the *Auer* case and other post-*Auer* circuit court decisions addressing this issue are not inconsistent with the conclusions reached in *Davis*. In *Davis*, the City employed in excess of one hundred exempt employees from 1986 through 1994.[9] With regard to more than one hundred exempt employees over an eight-year period, there were only *four deductions* that occurred for periods of less than a week.[10] Notwithstanding case law and Department of Labor opinions to the contrary, the City, in an abundance of caution, also reimbursed two employees who had weeklong suspensions.

In all, there were only four suspensions of exempt employees for less than a week and two suspensions for a

---

[9] Petitioners cite to disciplinary suspensions in 1980 and 1983, prior to the application of the FLSA to public entities through *Garcia v. City of San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The existence of two suspensions prior to the application of *Garcia* are irrelevant and cannot be used to establish a pattern or for any other purpose. In fact, the reference to such deductions is improper and subject to being stricken.

[10] Courts have prohibited partial-day suspensions of otherwise exempt employees, but not one-week suspensions. *Bowman v. City of Indianapolis*, 133 F.3d 513 (7th Cir. 1998) (suspensions without pay for less than one week may destroy an employee's exempt status); *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) (municipality complied by adopting policy that exempt employees could not be suspended for periods of less than one week); *see also, Stanley v. City of Tracy*, 120 F.3d 179 (9th Cir. 1997) (implying that suspensions of less than one week do not destroy exempt status). Additionally, DOL opinions specifically provide that exempt employees *can* be suspended for one-week periods. *See, e.g.*, DOL Op. Ltr. March 29, 1991; DOL Op. Ltr. September 10, 1992.

weeklong period. Interestingly, at least one federal court has disagreed with the Petitioners' argument that such deductions must, *ipso facto*, constitute a "pattern" of improper deductions. The Southern District of New York in *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997) specifically noted as follows:

> The Eleventh Circuit's decision in *Davis* is not facially inconsistent with the Secretary's interpretation, in that six improper deductions over an eleven-year period could be construed not to constitute a "pattern" of improper deductions.

Id. at 257 n.12.

Although *Auer* admittedly involves a one-time deduction, its reasoning is not inconsistent with that of the Eleventh Circuit in *Davis*, nor would the Court's decision in *Auer* necessarily warrant a different result under the facts of this case.

B. *Davis* Does Not Conflict With Other Circuits With Regard To The Window Of Correction.

The Petitioners do not cite any post-*Auer* circuit court decisions that conflict with *Davis* on the interpretation or application of the window of correction. In fact, the Petitioners do not even cite to a circuit court decision that has declared itself to be in conflict with *Davis*. *Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. den.*, 117 S. Ct. 1081 (1997) was decided *before Auer* and states that a "settled policy" of making improper deductions precludes the operation of the window of correction. Significantly, the *Spradling* court's basis for finding a "settled policy," a policy that was nominally applicable to both

exempt and non-exempt employees, was rejected by the court in *Auer*.[11] *Auer*, 117 S. Ct. at 910. In *Childers*, the Ninth Circuit, in fact, applied the window of correction despite the actual suspension of an exempt employee. *Childers*, 120 F.3d at 947. The municipal employer later reimbursed the suspended employee and instituted a new policy prohibiting any further similar suspensions. *Childers* does not create a conflict in any way with *Davis*.

Finally, the Petitioners cite to *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), which was decided six years *before Auer* and must be interpreted as having been effectively overruled or clarified by *Auer*. In *Malcolm Pirnie*, the court found that the window of correction was not applicable due to the existence of a "policy guide" which applied to all employees. *Id.* at 616. This kind of employment manual which does not constitute a "clear and particularized policy" as to exempt employees is specifically rejected by *Auer* as being an insufficient basis to prohibit the application of the window of correction. *Auer*, 117 S. Ct. at 911. In addition, *Malcolm Pirnie* does not interpret the window of correction in a disjunctive manner, an interpretation which itself directly conflicts with *Auer*.[12]

---

[11] More significantly, the Tenth Circuit noted in *Spradling* that the municipal employer had stipulated that the salaries of exempt employees were "subject to reduction as a form of discipline" pursuant to a written policy. *Spradling*, 95 F.3d at 1503. The City in *Davis* made no such stipulation, and no such finding was ever made by the trial court.

[12] The Petitioners do not cite to the Court the decision in *Balgowan v. New Jersey Department of Transportation*, 115 F.3d 214 (3d Cir. 1997), which holds that the window of corrections

C. *Davis* Does Not Conflict With The Secretary Of Labor's Interpretation Of The Window.

The Secretary of Labor has not chosen to file an *amicus curiae* brief in this case and has not expressed any opinion or interpretation of the window as to the *particular* facts in this case which were relied upon and served as the basis for the Eleventh Circuit's decision. As a result, the Petitioners' reliance on the Secretary's *amicus* brief in *Klem v. County of Santa Clara*, Case Nos. C-91-20674 RMW, C-95-20454 RMW (N.D. Cal. 1998) (P.App. 57) is misplaced. The factual circumstances underlying the Secretary's position in *Klem* are distinguishable from the facts in this case.[13] However, the Secretary's opinion, as expressed in *Auer*, is completely consistent with *Davis*.

As stated in *Auer*, the Secretary "requires a clear and particularized policy – one which "effectively communicates that deductions will be made in specified circumstances." *Auer*, 117 S. Ct. at 911. In the instant case, there

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should be interpreted in the disjunctive and that it would have been available notwithstanding the docking of any employee's pay for disciplinary reasons. *Balgowan* is consistent with both *Auer* and *Davis*.

[13] In *Klem*, more than 50 actual deductions took place during a six-year period. (Pet. at 20) While the Petitioners accuse the City of "seiz[ing]" upon an "absolute number of actual deductions," the petitioners engage in their own mathematical fixation by implicitly arguing that percentages are the appropriate standard to be applied. (Pet. at 20-21) The Petitioners' "formula" is no more valid a method for applying a non-formulaic standard such as the window of correction than any other.

is no "clear and particularized policy." Instead, there is only a general policy which applies to all employees. This is precisely the kind of "policy" which, in accordance with the Secretary's own analysis, does not require that the status of exempt employees be lost.

According to the Petitioners, the Secretary states that the window of correction should not be allowed where an employer "has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy." (Pet. at 20) As stated earlier, the particular facts in *Davis* do not constitute an established policy, and neither the trial court nor the Eleventh Circuit made such a finding. Furthermore, there is absolutely no caselaw or opinion from the Secretary which finds that four suspensions of less than a week over a six-year period constitutes a "pattern of impermissible deductions." The Petitioners inaccurately state that "eight out of one hundred exempt employees" were improperly suspended. (Pet. at 8, 20) In fact, under current caselaw and Department of Labor opinions, only four impermissible suspensions took place over a six-year period as to well *over* one hundred exempt employees. *See, supra*, note 9. The Secretary has never found or opined that four such suspensions constitute a "pattern."

Interestingly, the Petitioners cite to *Hoffman* as a case of which the Secretary has approved. The court in *Hoffman* specifically found that the number of suspensions which occurred in *Davis* "could be construed *not* to constitute a 'pattern' of improper deductions." *Hoffman*, 982 F. Supp. at 257 n.12 (emphasis supplied).

In short, while the Secretary has stated no opinion as to the particular facts in this case, the facts and holding of the Eleventh Circuit are not inconsistent with previous opinions of the Secretary.

II. THE PETITIONERS' ISSUES RELATING TO THE COSTS AWARDED TO THE CITY ARE MOOT INSOFAR AS THE CITY HAS WAIVED ITS RIGHT TO SUCH COSTS AND FILED SATISFACTIONS OF JUDGMENT AS TO THE COSTS AWARDED AT BOTH THE TRIAL AND APPELLATE LEVELS.

The City has filed satisfactions of judgment with respect to the cost awards entered by the trial court and by the Eleventh Circuit. (R.App. 1-4) As such, the issues raised by the Petitioners with respect to those cost awards are moot. The rule in federal cases is that an *actual* controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). "Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions'. . . . " *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), *quoting from United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). The petition must raise something more than an "ingenious academic exercise in the conceivable" and the Petitioners must allege that they have been or will be, in fact, perceptibly harmed by the contested action. *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), *citing U.S. v. SCRAP*, 412 U.S. 669, 688-89 (1973).

In this instance, the Petitioners are requesting, under whatever legal theory, that the award of costs against them be overturned. The City disputes that the award of

costs in its favor was in error. The City further disputes that the Petitioners are entitled to an award of costs as prevailing parties. Nonetheless, the City has chosen not to pursue its cost judgments against present and former employees and has satisfied those judgments, thereby absolving the Petitioners of any financial responsibility they may have had with respect to the judgments. Accordingly, the Petitioners' arguments with respect to the awarding of costs below is moot.

III. IN THE EVENT THE COURT SHOULD, NONETHELESS, CONSIDER THE PETITIONERS' ARGUMENTS RELATING TO COSTS, THE AWARD OF COSTS IS CONSISTENT WITH APPLICABLE STATUTES AND CASELAW

Without citing a case that conflicts with the decision to award costs in this case, the Petitioners wrongly contend that the Eleventh Circuit is in conflict with this Court and other circuits in holding that 29 U.S.C. § 216(b) does not preclude an award of costs to an employer. Section 216(b) merely follows the well-established principle of awarding costs to a prevailing plaintiff. Fed.R.Civ.P. 54(d)(1) provides that costs "shall be allowed to the prevailing party" except when the court directs otherwise or when an "express provision" is made by federal law or procedural rules.

Since 29 U.S.C. § 216(b) does not contain an express provision limiting the right of the employer to recover taxable costs, Rule 54(d)(1) applies and costs are properly awarded to the prevailing employer. *See Matthews v. Allis Chalmers*, 769 F.2d 1215, 1219 (7th Cir. 1985), *overruled on*

other grounds, 846 F.2d 457 (7th Cir. 1988) ("[S]ection 16 of the FLSA] . . . does not constitute 'an express provision' precluding the award of costs to a prevailing defendant. That section merely details the remedies available to prevailing plaintiffs, without addressing the award of costs available to successful defendants.").

Ironically, the case cited by the Petitioners as conflicting in principle with *Davis*, *Friedman v. Ganassi*, 853 F.2d 207 (3rd Cir. 1988), makes clear that Rule 54(d)(1) applies in this case. In *Friedman*, the court distinguished between (1) taxable costs referred to by Rule 54(d)(1) and (2) attorney fees and other litigation expenses, holding that § 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which bars attorney's fees to a prevailing defendant unless the plaintiff's suit is totally without merit, did not preclude an award of costs to a prevailing defendant under Rule 54(d)(1). Similarly, § 216(b) does not preclude an employer from recovering taxable costs.

Unlike another case cited by the Petitioners – *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541 (11th Cir. 1985)[14] – the instant case does not involve an award of *attorney's fees* to the City. *Kreager* is cited as conflicting because the court held that § 216(b) did not authorize awarding attorney fees to employers. However, *Kreager* merely followed the "American Rule" in that, absent a specific provision of Congress, a litigant may not recover attorney's fees. *Id.* at 1542-43, *citing to Alyeska Pipeline*

---

[14] Even if, *arguendo*, a conflict with *Kreager* existed, a conflict within a circuit does not provide a basis for certiorari review. Sup.Ct.R. 10.

Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975).[15] The "American Rule" and *Kreager* have no application to the instant case, which does not concern attorney's fees. The other case cited by the Petitioners – *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994) – is similarly inapposite because the court held, consistent with the "American Rule," that § 216(b) did not authorize the award of attorney's fees to employers.

Additionally, the Petitioners argue that the City was not the prevailing party. That conclusion, however, ignores the facts and results achieved in the case. First, the Petitioners did not prevail on the allegations of their complaint, which alleged that the City improperly docked the pay of exempt employees for absences of less than a day. By far, the taxable costs were principally spent refuting the Petitioners' claims that their pay was docked due to partial-day absences. Second, the Petitioners continued to contest the case even after the City exercised the window of correction. The City clearly prevailed in its effort to apply the window of correction and, as a result, must be considered to have prevailed in the litigation.

While the Petitioners are requesting that they be permitted, on remand, to petition the trial court for attorney's fees and costs as "prevailing parties," such a request is untimely. The Petitioners concede they did not raise the issue of their status as "prevailing parties" and their alleged entitlement to attorney's fees and costs until they petitioned the Eleventh Circuit for rehearing *en banc*.

---

[15] In fact, the *Kreager* court remanded the case to the trial court for a determination of whether the defendant was entitled to attorney's fees for bad faith litigation pursued by the plaintiff. *Kreager*, 775 F.2d at 1544.

At no time did the Petitioners request that the trial court designate them "prevailing parties." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 29 (1983) (court of appeals need not rule upon issue not presented to trial court).

Their belated suggestion that they deliberately chose not to do so because of the trial court's invalidation of the salary basis test is a *non sequitur*. The Petitioners are now claiming "prevailing party" status because of the employee "benefits" they achieved by "forcing" the City to invoke the window of correction and "admit" to certain FLSA violations. These alleged "benefits" were "achieved" irrespective of the trial court's determination as to the validity of the salary basis test. The same facts which would supposedly support the Petitioners' claim on remand to "prevailing party" status existed at the time the trial court ruled upon the parties' pending motions for summary judgment. The Petitioners could have petitioned the trial court for "prevailing party" status, notwithstanding the trial court's invalidation of the salary basis test, and preserved their record on appeal. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 n.5 (1985) (claim not raised below bound to fail on review). For reasons unknown, the Petitioners failed to do so. As a result, they are precluded from making such a claim in their petition. *Moses H. Cone*, 460 U.S. at 29.

Finally, the Petitioners do not cite to any cases supporting their claim that the award of taxable costs in this case is contrary to 29 U.S.C. § 216(b) and Rule 54(d)(1).

IV. THE *DAVIS* DECISION DOES NOT RAISE IMPORTANT AND UNRESOLVED PROBLEMS WITH FAR-REACHING OR RECURRING IMPLICATIONS

As stated earlier, the Eleventh Circuit, itself, limits the *Davis* decision to its particular facts. *Davis* is consistent with *Auer* and other circuits interpreting *Auer*. Although the Secretary has not expressed an opinion as to *Davis*, the *Davis* decision is consistent with previous opinions expressed by the Secretary.

There is no basis to believe that *Auer* has created confusion in the courts or abuse by employers, as alleged by the Petitioners. *Auer* was cited by the Eleventh Circuit in *Davis* and the cases decided by trial and appellate courts since *Auer* do not demonstrate the existence of "erroneous impressions and abuses created by misinterpretations of *Auer*," as alleged by the Petitioners. (Pet. at 26)

In summary, *Davis* is a solid, logical opinion, consistent with existing caselaw, and does not create law which extends beyond the particular facts in this case.

V. THE ALLEGED INVALIDITY OF THE WINDOW OF CORRECTION REGULATION IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI REVIEW

The Petitioners argue to the Court that, if their interpretation of the window of correction is not accepted, the regulation embodying the window of correction must be declared "invalid under the Administrative Procedures Act ["APA"], 5 U.S.C. § 706(2)(A) and (C) as arbitrary,

capricious, an abuse of discretion, not in accordance with law, and 'short of statutory right'." This precise argument was rejected by the Court in *Auer.*

The respondents in *Auer* similarly argued to the Court that the disciplinary deduction rule embodied in 29 C.F.R. § 541.118(a) was "arbitrary" and "capricious" in violation of the APA. Justice Scalia, writing on behalf of a unanimous Court, noted:

> [T]here is no basis for the court to set aside the agency's action prior to any application for relief addressed to the agency itself. The proper procedure for pursuit of the respondents' grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(c), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706.

Auer, 117 S. Ct. at 910.

To the extent the Petitioners' argument could be construed as a substantive challenge to the regulation based upon an alleged inconsistency between the regulation and the intent of the FLSA, such an argument must also fail. The Petitioners' reliance on the Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989) is misplaced.

In *Betts*, the Court considered the substantive validity of a regulation it determined to be inconsistent with the intent requirements found in the Age Discrimination in Employment Act ("ADEA"). Since any discrimination

claim under the ADEA requires a showing of discriminatory intent, a regulation inconsistent with such an essential requirement cannot be upheld. *Betts*, 492 U.S. at 182. The same analysis is unavailable in this instance.

The Petitioners fail to cite to any statutory provision or any caselaw which establishes that a showing of intent is required to establish a violation of the FLSA. On the contrary, the issue of an employer's "intent" arises only *after* a determination of liability has been made and damages must be assessed. The employer's "intent" then becomes relevant in determining the applicable statute of limitations and whether to award liquidated damages. *See* 29 U.S.C. §§ 216(b), 255(a).

The window of correction is not "invalid," as urged by the Petitioners. It has been a tool used by the Secretary and by innumerable courts, including this Court, for many years. It is a logical and common-sense rule. The window of correction allows an employer, under appropriate circumstances, to make "whole" those employees whose salaries have been improperly reduced, and requires that the employer create a new policy certifying that impermissible deductions will never be made again. The result is that the employees receive their full pay and future mistakes are prevented. The only "negative" consequence of the window of correction is that large groups of employees, the vast majority of whom have never had their pay reduced, do not receive a windfall in the guise of damages for overtime pay which they were never intended to receive and which they never expected.

The window of correction is not analogous to the regulation which was struck down in *Betts*. Consequently,

since the Petitioners have otherwise failed to abide by the requirements of the APA in challenging the regulation, their argument in support of certiorari review must be rejected.

VI. THE PETITIONERS' ARGUMENT REGARDING REASSIGNMENT ON REMAND IS INSUFFICIENT TO WARRANT CERTIORARI REVIEW OF *DAVIS*

Although there is no indication that the judge created the appearance that he may be unable to perform his role in an unbiased manner, the Petitioners seek reassignment of this case in the event of remand. In an attempt to establish the existence of potential conflict, the Petitioners cite to *Offutt v. United States*, 348 U.S. 11 (1954), a case in which the actions of the trial judge do not remotely resemble the actions of the judge here. *Offutt* concerned a contempt proceeding heard by the same trial judge who had been personally embroiled with counsel throughout trial and who had made a statement to the jury indicating his hostility towards counsel. In arguing that the court "view the findings of fact and conclusions of law with caution, and not with the great deference normally accorded findings and conclusions prepared by a court," the Petitioners disregard the rule that findings of fact are reviewed for clear error. *See Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.")

The Petitioners received a fair hearing. The trial judge expressed his intention to find in favor of the City only after a lengthy and in-depth hearing which included

substantial colloquy with counsel for both sides. In addition, the Petitioners were given an opportunity to present objections and comments to the City's proposed order. *See In Re Colony Square*, 819 F.2d 272 (11th Cir. 1987) (a court's use of orders and opinions ghost written by counsel for prevailing party does not deny the other party due process). Bias sufficient to disqualify a judge exists when a judge's remarks demonstrate such pervasive bias and prejudice that it unfairly prejudices one of the parties. *U.S. v. Ramos*, 933 F.2d 968, 973 (11th Cir. 1991), *citing Whitehearst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979). While the Petitioners have taken certain language used by the trial judge out of context, it is clear that the judge played an active role during oral argument on the parties' motions for summary judgment and carefully considered the argument presented by both sides.

The conduct of the trial judge in this instance does not rise to the level required to constitute an "important and unresolved problem with far-reaching and recurring implications nationwide," as alleged by the Petitioners. Certiorari review of this issue is not warranted. Under the circumstances presented in this case and in accordance with this Court's ruling in *Anderson*, the Eleventh Circuit's treatment of the trial judge's factual findings was appropriate since they were not "clearly erroneous."[16]

---

[16] The petitioners' request that a new judge be assigned on remand if certiorari is granted is immaterial to the Court's initial determination as to whether the petition should be granted.

CONCLUSION

Based upon the arguments set forth above, the Petitioners have failed to demonstrate the existence of a conflict either between *Davis* and any precedent of this Court or between *Davis* and the post-*Auer* decision of any other United States court of appeal with respect to an important matter. Additionally, the Petitioners have failed to establish the existence of an important question of federal law decided by the Eleventh Circuit in *Davis* that has not been, but should be, settled by this Court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

April 17, 1998

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS, MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs,

vs.

THE CITY OF HOLLYWOOD, a municipal corporation of the State of Florida

Defendant.

SATISFACTION OF JUDGMENT

KNOWN ALL MEN BY THESE PRESENTS that the City of Hollywood, Florida, the defendant in the above-styled case, wherein a judgment was rendered on November 30, 1995 in the above-named court for Nine Thousand Eight Hundred Seventeen and 11/100 ($9,817.11) Dollars against Bruce Davis; Robert S. Davis; Hugh Bowen; Mike Rozos; Bernice W. Rowe; Sylvester Jackson; Michael Ignasiak; Wesley Forestier; Ernest W. Atkins; William Shulby; Earl Mitchell; Russell L. Cormican; Ronald Pagano; Gilbert Frazier; James A. Walsh; Paul F. Glynn; George Geisler; Don E. Peoples; and Donald Allen, the plaintiffs therein, do hereby acknowledge full payment and satisfaction thereof, and hereby consent that the same shall be satisfied of record.

WITNESS my hand and seal this 16th day of April, 1998.

CITY OF HOLLYWOOD

By /s/ Jeffrey P. Sheffel
Jeffrey P. Sheffel
Acting City Attorney

STATE OF FLORIDA)
) ss.
BROWARD COUNTY)

BEFORE ME, the undersigned authority, personally appeared Jeffrey P. Sheffel, who is the Acting City Attorney for the City of Hollywood, and who is personally known to me, deposes and says that the facts set forth in the foregoing are true and correct.

WITNESSES my hand and seal this 16th day of April, 1998.

/s/ M. Stockman
Notary Public

M. Stockman
Print Name

Commission Expires:

M. Stockman my commission #CC529966 expires February 4 in the year 2000.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 95-5304 & 95-5536

BRUCE W. DAVIS, MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs-Appellants,

v.

THE CITY OF HOLLYWOOD, a municipal corporation of the State of Florida,

Defendant-Appellee.

SATISFACTION OF JUDGMENT

KNOWN ALL MEN BY THESE PRESENTS that the City of Hollywood, Florida, the defendant in the above-styled case, wherein a cost judgment was rendered on December 1, 1997 in the above-named court for One Hundred Three and 50/100 ($103.50) Dollars against Bruce Davis; Robert S. Davis; Hugh Bowen; Mike Rozos; Bernice W. Rowe; Sylvester Jackson; Michael Ignasiak; Wesley Forestier; Ernest W. Atkins; William Shulby; Earl Mitchell; Russell L. Cormican, Ronald Pagano; Gilbert Frazier; James A. Walsh; Paul F. Glynn; George Geisler; Don E. Peoples; and Donald Allen, the appellants therein, do hereby acknowledge full payment and satisfaction thereof, and hereby consent that the same shall be satisfied of record.

WITNESS my hand and seal this 16th day of April, 1998.

CITY OF HOLLYWOOD

By /s/ Jeffrey P. Sheffel
Jeffrey P. Sheffel
Acting City Attorney

STATE OF FLORIDA)
) ss.
BROWARD COUNTY)

BEFORE ME, the undersigned authority, personally appeared Jeffrey P. Sheffel, who is the Acting City Attorney for the City of Hollywood, and who is personally known to me, deposes and says that the facts set forth in the foregoing are true and correct.

WITNESSES my hand and seal this 16th day of April, 1998.

/s/ M. Stockman
Notary Public

M. Stockman
Print Name

Commission Expires:

M. Stockman my commission #CC529966 expires February 4 in the year 2000.

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Docket No. 97-1320

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S OBJECTION TO MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OBJECTION TO MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to S.Ct.R. 37.5, respondent, City of Hollywood ("City"), hereby files its objections to the Motion and Brief on Behalf of American Workers in Support of Petition for Writ of Certiorari, filed by *amicus curiae*, Donald J. Jaret ("Motion"), and states as follows:[1]

LEGAL ARGUMENT

I. THE MOTION SHOULD BE DENIED BECAUSE IT RAISES NON-JURISDICTIONAL ISSUES NOT RAISED BY THE ACTUAL PARTIES.

The focus of the Motion is that the "window of correction" regulation embodied in 29 C.F.R. § 541.118(a)(6) should be held unconstitutional because it allegedly usurps the powers granted to federal courts under Article III, § 2 of the United States Constitution. The motion concedes that this argument was *never* presented or even addressed by either the petitioners or the City either at trial or on appeal before the United States Court of Appeals for the Eleventh Circuit. Motion, p.1.[2]

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[1] / While the certificate of service indicates that the Motion was filed with the Court on April 16, 1998, the City did not receive the Motion until April 20, 1998.

[2] / The Motion appears to misconstrue the import of S.Ct.R. 37.1 which encourages the filing of *amicus curiae* briefs that bring to the attention of the Court "*relevant* matter not already brought to its attention by the parties. . ." (emphasis supplied). As noted below, the Court has not construed this invitation as an open-ended request for *amici* to inject issues never previously raised by the parties to the proceeding. An *amicus curiae* brief that fails to meet the requirements of S.Ct.R. 37.1 is "disfavored."

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This Court has repeatedly held that a non-jurisdictional issue urged by an *amicus* will not be considered by Court if the issue has not also been raised by the parties before the Court. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97, n. 4 (1991); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n. 2 (1981); *see also Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185, 1204, n. 5 (1995) (when the record does not adequately present the issue for the Court's consideration, the Court should decline to address the question).

Since the City has not consented to the filing of an *amicus curiae* brief,[3] and the principal issue raised by the Motion is one not raised or even addressed by the parties, the Motion should be denied.

II. THE MOTION ATTEMPTS TO CIRCUMVENT ESTABLISHED AVENUES OF APPELLATE REDRESS BY ASKING THIS COURT, IN ESSENCE, TO RULE UPON THE APPLICATION OF LAW TO THE FACTS OF AN UNRELATED DISTRICT COURT PROCEEDING.

The Motion repeatedly makes reference to an adverse district court ruling in the case of *Eugene v. McDonald's*, Case No. 96-2324-CIV-Highsmith (S.D. Fla. 1997).[4] The Motion suggests that the court in *Eugene* entered final judgment in favor of the

---

[3] / A motion for leave to file an *amicus curiae* brief submitted prior to the Court's consideration of a petition for writ of certiorari is not favored. S.Ct.R. 37.2(b).

[4] / A review of the district court's record in the *Eugene* case reveals that Mr. Jaret, who has submitted the Motion, was counsel of record for the plaintiffs in the *Eugene* case.

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plaintiffs, finding a violation of the FLSA, but permitted the defendant employer to exercise the window of correction post-judgment to avoid liability.[5] Neither this Court's application of the window of correction in *Auer v. Robbins*, 117 S.Ct. 905 (1997), nor the Eleventh Circuit's application of the window in *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), warrants the conclusion apparently reached in *Eugene* that the window may be applied after a final judgment of liability has been entered. The facts in *Auer* and *Davis* are utterly unlike those set forth at pages 7 through 10 of the Motion.

If the Motion seeks to have the district court's decision in *Eugene* reviewed for judicial error, then the appropriate appellate remedies should be pursued. An appeal should not be disguised as either a motion for leave to file an *amicus curiae* brief, or worse, a request for an advisory opinion from this Court as to litigation pending in the lower courts.

III. THE MOTION FAILS TO IDENTIFY A COGNIZABLE *AMICUS* INTEREST IN THE OUTCOME OF THESE PROCEEDINGS.

The motion purports, generically, to represent the interests of "American workers." The motion makes no distinction between exempt and non-exempt workers under the Fair Labor Standards Act ("FLSA"), the former of which have no

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[5] / The Motion's fundamental criticism of the window of correction is that it permits a party "against whom a 'judicial determination' has been made," to avoid liability by correcting past practices. *See* Motion, pp. 2, 4, 7-10.

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possible interest in the interpretation and application of the window of correction.

CONCLUSION

For all the foregoing reasons, the Motion should be denied.

I HEREBY CERTIFY that a true and correct copy of the forgoing was furnished by U.S. Mail this 29th day of April, 1998 to Donald J. Jaret, Esq., Law Officers of Donald J. Jaret, 4343 West Flagler St., Suite 350, Miami, FL 33134; Brenda J. Carter, Esq., Suite 300, 1451 West Cypress Creek Road, Fort Lauderdale, FL 33309; and Timothy J. McDermott, esq. 110 S.E. 6th St., 15th Floor, Fort Lauderdale, FL 33301.

Respectfully submitted,

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By _____
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April 29, 1998

FILED
MAY 6 1998
CLERK

No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITIONERS' REPLY BRIEF

I. THE CITY'S ERRORS IN STATING THE CASE

1. The City claims it "immediately initiated an internal audit" once discovery revealed a one-week suspension, and "[i]mmediately upon discovery of the suspensions, . . . invoked the window . . . .". Opp. 3, 4. It fails to disclose that this "fact" was hotly *disputed*, and rebutted by documents and deposition testimony of City officials. *See* Appellants' Reply Brief, pp. 16-18, citing Record. The case was decided on summary judgment. This disputed "fact" should not have been presented here.

2. The City claims six instances of prohibited docking between 1986 and 1994. The correct number is eight, from 1986 to 1992. P.App. 82-110. The City *reimbursed six*. Docking not repaid, and those prior to 1986[1], are relevant to determine whether exempt employees were "subject to" such docking. The relevant period is *before* the City was sued in 1992. It should not get credit for refraining from docking *after* it was sued.

3. The City claims plaintiffs "were among the highest paid of all City employees . . . ". Opp. p. 3. There is no support in the Record for such a claim.

4. The City misstates the Complaint. Employees stated they were not paid for overtime hours they worked. That was sufficient. *See* Eleventh Circuit Pattern Jury Instructions (Civil Cases) (West 1990), Federal Claims Instruction 9.1; *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 n. 11 (1960); *Vance v. Terrazas*, 444 U.S. 252, 269 n. 11 (1980) (burden of proof not shifted if complaint

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[1] Plaintiff R.S. Davis lost wages in 1980. P.App. 113.

mentions anticipated defense); *Gomez v. Toledo*, 446 U.S. 635, 640-641 (1980) (no obligation to plead around affirmative defense). Whether they were subject to docking for prohibited reasons became an issue when the City claimed exemption.

5. The City claims no exempt employee was ever docked for a part day absence. The question is whether they were "subject to" it. Plaintiffs testified they were required to reduce leave and comp credits for such absences and their paycheck would be reduced if they did not have sufficient leave. The City admitted this was true. Appellants' Initial Br., p. 8.

II. THE CITY'S ATTEMPT TO MOOT THE ISSUE OF COSTS COMPELS EITHER VACATUR OR REVERSAL OF THE JUDGMENT

A. Cost Issue Is Not Moot. The City argues its actions render the cost issue moot. Its suggestion of mootness should be denied:

1. ***City admits the issue will surely recur, and evade review.*** The City "disputes that the award of costs in its favor was in error", and "has [simply] chosen not to pursue its cost judgments . . . ." Opp. pp. 14-15. As recently as February 9, 1998, and February 18, 1998,[2] however, the City demanded payment of the cost judgment, and threatened to "execute upon the cost judgment immediately", unless the Petition was withdrawn. Rply.App. pp. 3, 4.

An issue is not moot if it is capable of recurring, yet evading review. *See, e.g., Vitek v. Jones*, 445 U.S. 480,

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[2] The City opposed a stay of the cost judgment pending appeal. Employees were required to post a $12,000 cash bond.

486-487 (1980) (not moot unless "absolutely clear" could not reasonably be expected to recur). By continuing to insist its conduct was legal, a party basically admits the same behavior *will* recur, and the issue is not moot. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *In re Center for Auto Safety*, 793 F.2d 1346, 1351-1353 (D.C. Cir. 1986) (if public officials vigorously assert legality of conduct, correct to assume it may be resumed).

And, the City is free to dock again, use the window again after it is sued (or even after appeals), and again demand recovery of costs from employees. No court order prevents it. The City may repeal its resolution, or reinstate the old practice with impunity. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 927-928 (9th Cir.), *cert. denied*, 502 U.S. 1033 (1991) ("case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision.").

2. ***Public interests and others similarly situated are affected.*** Mootness is readily rejected if the action protects broad public interests, rather than only private interests. *U.S. v. W.T. Grant*, 345 U.S. 629, 632 (1953) (because of public interest, not moot; such a powerful weapon against enforcement of public law should not be given a defendant); *Wirtz v. Local 153*, 389 U.S. 463 (1968) (not moot because need to fulfill purposes of Labor Act).

The public interest would be served by reviewing this issue on the merits. *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), undoubtedly has a chilling effect on all employees. Moreover, misstatements by the City in court documents (Argument II.B.), give the impression the *Davis* employees were forced to pay their employer's costs when it used the window after it was sued. *See Honig v. Doe*, 484 U.S. 305 (1988) (in class

actions, plaintiff may continue to represent interests of others even after prospect of individual recovery has vanished); *Schall v. Martin*, 467 U.S. 253 n. 10 (1984) (capable of recurring if those similarly situated will be subject to the same conduct).

3. ***Court is capable of affording effective relief.*** The Court has the power to undo the untenable situation now faced by all employees, by removing the fear that they will have to pay their employer's costs, even when the employer is wrong. This will restore their statutory right to sue employers for violations. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 13 (1992) (not moot because Court could still grant effective relief, even if remedy not "fully satisfactory").

B. Even If "Moot", Procedure Is To Grant Certiorari And Vacate Because It Resulted From The City's Unilateral Action. Contrary to statements the City made under oath in documents it filed April 17, 1998, there was no "payment" by employees. The City abandoned its cost judgments. Rply.App. 1. The City argues its unilateral action moots the issue and precludes this Court's review. But, Article III "does not prescribe such paralysis." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Instead, the Court must look to the "nature and character of the conditions which have caused the case to become moot". *U.S. v. Hamburg American Co.*, 239 U.S. 466, 477-478 (1916).

A party seeking review "ought not in fairness be forced to acquiesce in the judgment" when "mootness results from the unilateral action of the party who prevailed below". *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18 (1994). Instead, vacatur is appropriate. *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921); *Anderson v. Green*, 513 U.S.

557 (1994) (vacated since mootness not the result of voluntary action by party who lost below).

Vacatur, or reversal, is necessary to strip *Davis* of precedential value and deprive employers of this *in terrorem* tool. *See Arizonians for Official English v. Arizona*, 117 S.Ct. 34 (1996) (vacatur granted so party does not obtain a favorable judgment, then moot the dispute, and retain benefit of the judgment); *Penguin Books U.S.A., Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991) (vacatur prevents winner from "shielding erroneous decisions from reversal" while preserving preclusive effect).

III. ON THE MERITS: FLSA COSTS & ATTORNEYS' FEES

A. Employees' Request For Attorneys' Fees And Costs Not Untimely Since Impossible To Seek In Trial Court. If the City is found liable for overtime wages, employees would have an absolute right to attorneys' fees and costs under § 216(b). The City only questions whether employees may recover fees and costs for forcing it to repay wages, change policies, and promise future compliance.

The City fails to recognize the different criteria at issue. Rule 54(d)(1) permits an award of costs to a "prevailing party". In contrast, § 216(b) mandates an award of attorneys' fees and costs, not to whomever the "prevailing party" is, but to employees who receive a "judgment".

When the trial court struck down the entire pre-1992 salary basis test, it meant the City had no *legal obligation* to comply with it, and no obligation to repay money it docked prior to 1992. Accordingly, the employees were precluded from receiving a "judgment" in their favor.

Without a judgment, employees could not recover attorneys' fees and costs.

But failure to receive a "judgment" did not prevent employees from using the Rule 54(d)(1) "prevailing party" standard (asserted by the City), as a ***shield*** against paying the City's costs. Forcing the City to revise policies and promise future compliance, should have been enough to avoid reimbursing its costs. Once *Auer* held the salary basis test valid (during the *Davis* appeal), the situation changed significantly. Then, employees received wages to which they were entitled, even if they did not receive overtime wages. Then, the City was monetarily and legally liable for not complying with the test for exemption.

B. FLSA Attorneys' Fees Cases Are Relevant To FLSA Costs. The City claims the American Rule and FLSA attorneys' fees cases do not apply here. However, just as Fed.R.Civ.P. 54(d)(1) defers to any statute with its own provision for costs, the American Rule defers to any statute with a provision for attorneys' fees. Recognizing Rule 54(d)(1) defers to § 216(b), the Eleventh Circuit affirmed the award of costs to the City based upon the text of § 216(b). The weight of authority holds the text of § 216(b) precludes employers from recovering attorneys' fees from employees. This text must also preclude employers from recovering *costs* from employees.

The City also claims the intracircuit conflict on costs is irrelevant. But, "existence of an intracircuit conflict should not be ignored in preparing a petition for certiorari . . . ". Stern, Gressman, Shapiro, Geller, *Supreme Court Practice*, § 4.6, p. 176 (7th ed. 1993); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari

granted because of intracircuit conflict and importance of the question).

C. Award Of Costs To FLSA Violators Is Palpably Wrong. *Davis'* precedent on costs has wide impact. In *Arrington v. City of Macon*, 1998 U.S. Dist. LEXIS 809, *7 (M.D. Ga. January 28, 1998), the court held employees cannot recover attorneys' fees and costs once an employer elects to use the window, because under the same circumstances, *Davis* awards costs to employers. *See also, Eugene v. McDonald's Corp.*, No. 96-2324-Civ-Highsmith, *appeal pending*, 11th Cir. No. 98-4257 (no attorneys' fees and costs to employees once employer elects the window because the window wipes away violations and prevents a judgment in employees' favor). Rply.App. 5.

IV. TO AVOID CONFLICT, THE CITY REWRITES *AUER* AND *DAVIS*

The City urges that under *Auer*, an employer loses exemption only if he had both an actual practice of improper docking, *and* a particularized policy.[3] On the contrary, *either* circumstance suffices to prove employees were "subject to" docking. Only in the "absence [of actual deductions does the Secretary] require[] a clear and particularized policy . . . ". *Auer* at 911. A practice of actually docking exempt employees rebuts any presumption that a policy was intended to apply only to non-exempt employees.

The City's denials of an actual practice of docking overtime-exempt employees, are belied by the fact that

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[3] A "particularized policy" is one effectively communicating deductions will be made in specified circumstances. *Auer*, 911.

such docking was *routinely* imposed and authorized for six straight years. Behavior that is recurring is a practice. Its denials of a policy are belied by the fact City officials interpreted their own rules to authorize such docking for any listed reason. But, nowhere does the City claim the docking that occurred here was a one-time event under unusual circumstances – the criteria specified in *Auer* for availability of the window.

The City claims *Davis* found it had no actual practice and no policy. It is unlikely such critical findings were made *sub silentio*. In the Eleventh Circuit, existence of an actual practice or policy is irrelevant if docking was for reasons other than lack of work. The *only* facts important to the *Davis* court were whether the City complied with the procedures of the window: not lack of work, repay, and promise compliance. P.App. 5. It was not at all concerned with whether the City was eligible to use it.

This is the prevailing law in this Circuit – law that conflicts with *Auer*. *See Arrington v. City of Macon*, 973 F.Supp. 1467 (N.D. Ga. 1997). Applying *Auer* and Eleventh Circuit precedent, the court concluded that as a matter of law, plaintiffs were not exempt because eleven had been docked for minor infractions over a five-year period, and they had "clearly demonstrated" a settled policy of such docking. *Id.* at 1469-70, 1473, 1475. Yet, the court held that so long as reasons were not lack of work, the employer was "clearly entitled" to the benefit of the window and could repay the money and promise future compliance, at a later time. *Id.* 1474-1475.

Regarding *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D. N.Y. 1997), the only reason the court thought *Davis* may not have shown a pattern and thus did not "facially" conflict with *Auer*, was its belief that there were six

instances of improper pay-docking over ***eleven years*** (from 1986 to 1997 when *Davis* was rendered). *Id.* at 257 n. 12. In fact, *Davis* had almost *triple* the frequency assumed in *Hoffman*. *See* Argument (I)(2).

The City urges week-long suspensions without pay are not a violation. It makes no sense, however, that if a minor violation occurs, the employer is prohibited from docking for less than a week, but permitted to dock for more than a week.[4] It also conflicts with the regulation. Reductions for *major* safety violations are allowed – for two days or two weeks. 29 C.F.R. § 541.118(a)(5). Reductions for *minor* violations are prohibited. Period. In addition, the salary basis test prohibits deductions for absences "occasioned by the employer". 29 C.F.R. § 541.118(a)(1). An employer who suspends an employee without pay, has "occasioned" that loss of pay.

V. CONFLICT AND VALIDITY OF WINDOW MERITS REVIEW

Conflict regarding application of the window in light of *Auer* has been acknowledged, and is growing. *Hoffman*, 982 F.Supp. 249 (S.D. N.Y. 1997); *Carbu v. Chicago Bldg. Services, Inc.*, 1998 U.S. Dist. LEXIS 969, *7-8 (N.D. Ill. Jan. 21, 1998). Quoting *Auer*, the City claims an invalidity argument must be raised with the agency first. In the same sentence, however, the Court stated, "A court may certainly be asked by parties . . . to disregard an agency

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[4] The City cites DOL opinion letters. They are not binding, not final, and are subject to withdrawal. 29 C.F.R. § 775.1; 790.17(d), (h), (i); *Taylor-Callahan-Coleman Counties v. Dole*, 948 F.2d 953, 957 (5th Cir. 1991). Nor did the City rely on them when it imposed week-long suspensions.

regulation that is contrary to the substantive requirements of the law". Only complaints of failure to rulemake, must first be brought to an agency. *Auer*, 910.

The City claims an employer's intent is relevant only to assess damages after it has been found liable. An employer that uses the window admits liability for money it docked. The City also omitted 29 U.S.C. § 259 that allows an employer to avoid liability for overtime wages only if it proves good faith compliance. Lastly, while it is true that the window has been discussed in cases, until *Auer*, it was almost always interpreted conjunctively. The DOL always interpreted its regulation that way and always required an employer prove its docking was inadvertent.

CONCLUSION

Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

BRENDA J. CARTER *
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Suite 300
Fort Lauderdale, Florida 33309
(954) 489-2718
* *Counsel of Record*

TIMOTHY J. MCDERMOTT
TRIPP SCOTT CONKLIN & SMITH
110 Southeast 6th Street
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Fort Lauderdale, Florida 33301
(954) 525-7500
Counsel for Petitioners

May 5, 1998

AFFIDAVIT OF ATTORNEY TIMOTHY J. McDERMOTT

STATE OF FLORIDA)
COUNTY OF BROWARD)
)

TIMOTHY J. McDERMOTT, being first duly sworn on oath, deposes and states as follows:

1. I am co-counsel in a pending action captioned in the Trial Court as: *Bruce Davis, et al. vs. City of Hollywood,* trial court case number 92-6993-CIV-RYSKAMP, United States District Court, Southern District of Florida (the "Action"). A Petition for Writ of Certiorari is currently pending before the United States Supreme Court in that Action. I make this Affidavit on the basis of my own personal knowledge.

2. On April 20, 1998, I received a copy of four documents served by counsel for the City of Hollywood: Two "Satisfaction of Judgments" and two "Notice of Filing Satisfaction of Judgments" which were executed by representatives of the City of Hollywood. They reference two cost judgments entered against the plaintiffs in this case in the amounts of $9,817.11 and $103.50. In those two "Satisfaction" documents, the City states, under oath, that it *"does hereby acknowledge full payment* and satisfaction thereof . . . ".

3. Those documents do not accurately state the true facts. Specifically, none of the plaintiffs in the action, nor anyone on their behalf, has ever paid any money, or provided any consideration, to the City of Hollywood in satisfaction of either of those cost judgments. In short, they were not "paid" by the plaintiffs. Moreover, neither

plaintiffs' counsel nor our clients were consulted in any regard prior to the City's unilateral decision to file those "Satisfaction" documents, nor did the City ask for, or obtain, their consent to perform the unilateral act.

4. I make this Affidavit in order to correctly reflect the true state of facts for the record. FURTHER AFFIANT SAYETH NAUGHT.

/s/ Timothy J. McDermott
TIMOTHY J. McDERMOTT

SWORN TO AND SUBSCRIBED before me this 4th day of May, 1998.

/s/ Nancy Paige Fulton
NOTARY PUBLIC
State of Florida

My Commission Expires:

[SEAL]

Nancy Paige Fulton
MY COMMISSION # CC677033
EXPIRES
September 2, 2001
BONDED THRU TROY FAIN
INSURANCE, INC.

WEISS SEROTA & HELFMAN, P.A.
ATTORNEYS AT LAW
[ ] 2665 SOUTH BAYSHORE DRIVE [ ]
SUITE 420
MIAMI, FLORIDA 33133

TELEPHONE (305) 854-0800
TELECOPIER (305) 854-2323

February 9, 1998

Re: City of Hollywood adv. Davis et al.

Dear Tim:

As you know, the Eleventh Circuit has affirmed the final judgment of the trial court and denied the appellants' motion for rehearing. The motion for stay of the issuance of the mandate was denied on December 1, 1997. As a result, the costs ordered by the trial court are due and owing to the City of Hollywood. Although the mandate of the court issued more than two months ago, the costs have not been paid to the City.

Please have a check written to the City of Hollywood in the total amount of costs plus interest and forward that check to me at your earliest convenience. I believe there is also a minimal cost bill issued by the appellate court in the amount of $103.50.

If you have any questions, please feel free to give me a call.

Sincerely,

/s/ Joseph H. Serota
Joseph H. Serota

cc: Brenda Carter, Esq.
Jamie A. Cole, Esq.

WEISS SEROTA & HELFMAN, P.A.
ATTORNEYS AT LAW
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SUITE 420
MIAMI, FLORIDA 33133

TELEPHONE (305) 854-0800
TELECOPIER (305) 854-2323

February 18, 1998

Re: City of Hollywood adv. Davis et al.

Dear Tim:

I am writing to make a formal offer of settlement with regard to this case. The City agrees to waive all costs incurred in the trial and appellate courts in exchange for your withdrawal of the petition for writ of certiorari so that it would not be necessary for the City to file a response. Since the City's response is due on March 13, 1998, I would appreciate it if you speak to your clients as soon as possible.

In addition, the City has advised me that in the event this offer of settlement is not accepted by your clients, I should move forward and execute upon the cost judgment immediately.

I know that you have numerous clients. However, please do your best to contact and advise them of this settlement offer within the next several days.

Sincerely,

/s/ Joseph H. Serota
Joseph H. Serota

cc: Brenda Carter, Esq.
Jamie A. Cole, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2324-CIV-HIGHSMITH

MICHAEL EUGENE
on behalf of himself and
all others similarly situated,

Plaintiff,

v.

McDONALD'S CORPORATION,
a Delaware corporation,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES AND REASONABLE EXPENSES

(Filed Jan. 22, 1998)

THIS CAUSE comes before the Court upon Plaintiffs Motion for Award of Attorney's fees and Reasonable Expenses of Litigation and the documents filed in support and opposition thereto. By Order entered on April 18, 1997, this Court dismissed this action because the parties agreed that the defendant has exercised its "window of correction" under the Fair Labor Standards Act ("FLSA"). Currently, the plaintiff seeks attorney's fees under 29 U.S.C. § 216(b), asserting that he is entitled to such an award because he was a "prevailing plaintiff".

The FLSA authorizes the award of attorney's fees under certain circumstances. 29 U.S.C. § 216(b). Section 216(b) provides in pertinent part that "[t]he Court shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee be paid by the

defendant and the cost of the action." Therefore, it appears that application of this provision is limited to those instances in which judgment has been rendered in favor of the plaintiff. In the case at hand, not only has there been no judgment in favor of the plaintiff, but his complaint was dismissed with prejudice based upon the defendant's exercise of the "window of correction".

Moreover, in that Order this Court noted that, under 29 C.F.R. § 541.118(a)(6), "[h]aving properly availed itself of the 'window of correction', the defendant is to be treated, for all practical purposes, as if the alleged infraction never occurred." The Court notes that charging the defendant with the plaintiffs attorney's fees would not be treating the defendant as if no violation had occurred. Therefore, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Award of Attorney's Fees and Reasonable Expenses of Litigation (D.E. 30) is DENIED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 22nd day of January, 1998.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Donald J. Jaret, Esq.
Curtis L. Mack, Esq.
Thomas J. Piskorski, Esq.
Jonathan Kroner, Esq.

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No. 97-1320

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BRUCE W. DAVIS, *et al.*, *Petitioners*

v.

THE CITY OF HOLLYWOOD, *Respondent.*

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY IN SUPPORT OF MOTION AND BRIEF OF AMICUS CURIAE

The City lodged objections to the *amicus curiae* brief submitted in support of Petitioners. The motion and brief of the *amicus curiae* were timely filed on April 16, 1998.

The City objects that the *amicus curiae* attempts to inject an issue never raised or addressed by the parties. On the contrary, Petitioners raised the question of the validity of the window of correction in the trial court, before the Eleventh Circuit, and included it as a question presented to this Court (Question 3). Challenging the regulation's constitutionality, challenges its validity. Thus, it is an additional argument on an issue properly before the Court, and falls squarely within S.Ct.R. 37.1.

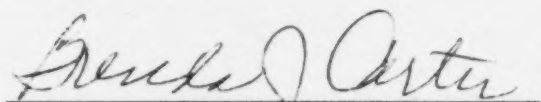
The City also objects that the *amicus curiae* merely seeks an advisory opinion because neither *Auer* nor *Davis* lead to the conclusion on the window that was reached in *Eugene v. McDonald's Corp.*, Case No. 96-2324-CIV-HIGHSMITH (S.D. Fla. 1997), *appeal*

pending, 11th Cir. No. 98-4257. *But see Arrington v. City of Macon*, 973 F.Supp. 1467 (M.D. Ga. 1997), where the court first concluded that under *Auer*, plaintiffs were not exempt as a matter of law, because they had clearly proven the employer had both an actual practice for five years of docking them in violation of the salary basis test, and had a settled policy of doing so. Yet, after that judgment, the court later concluded that as long as the reasons were not lack of work, the employer could use the window later, to avoid all liability. *Id.* 1469-70, 1473-75.

As such, the *amicus curiae* seeks not an advisory opinion, but reversal of *Davis* because of the adverse, recurring and far-reaching nature of the precedent it established. If the *amicus curiae* is concerned about the adverse impact *Davis* has on current and future employees he represents in the private sector, that is a legitimate reason for bringing to the Court's attention additional reasons why *Davis* is bad law, and warrants reversal.

The *amicus curiae*'s motion for leave to file a brief should be granted.

Respectfully submitted,



Brenda J. Carter
Counsel for Petitioners
1451 West Cypress Creek Road
Suite 300
Fort Lauderdale, Florida 33309
(954) 489-2718

CERTIFICATE OF SERVICE

I, Brenda J. Carter, a member of the Bar of this Court, hereby certify that a copy of the foregoing was mailed, first class postage prepaid, to Joseph H. Serota, Esq., Weiss Serota & Helfman, 2665 So. Bayshore Drive, Suite 420, Miami, FL 33133, counsel for respondent, on May 6, 1998. I further certify that all parties required to be served have been served.

Brenda J. Carter

MOTION FILED
APR 17 1998

(3)

No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, et al.,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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AMICUS CURIAE'S MOTION FOR PERMISSION TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, DONALD J. JARET, ESQUIRE, hereby moves this Honorable Court for permission to file his Amicus Curiae Brief in support of Plaintiff/Appellant's Petition for Writ of Certiorari and in support thereof states:

1. The movant is familiar with and has reviewed the proceedings in this case as well as the Petition for Writ of Certiorari.

2. The movant is familiar with the rules of this Court requiring that the movant's brief may only be filed with the consent of the parties to this action or with leave of court.

3. The movant has contacted Counsel for Petitioner and Counsel for Respondent with respect to the receipt of permission to file this Brief. Brenda Carter, Esquire, Counsel for Petitioner has consented to the filing of this brief and Joseph Serota, Esquire, Counsel for Respondent, does *not*. This Brief may not be filed absent leave of court.

4. Leave of Court should be granted because this case involves important constitutional issues not heretofore raised by the parties or considered by this Court. The Salary Basis Regulation in general and the Window of Correction portion of such regulation in particular have been and continue to be the subject of significant judicial activity. This Court's decision in *Auer v. Robbins*, 117 S.Ct. 905 (1997), was but the first step in what will be a long and difficult process of determining the meaning and application of the Window of Correction Regulation,

29 C.F.R. § 541.118 (a)(6), if that regulation is, in fact, constitutional. The movant, therefore, respectfully requests that this Court consider the constitutionality of the Window of Correction Regulation prior to this Court's interpreting and issuing guidance as to the meaning and application of that regulation.

5. It is this Court's prerogative to determine the constitutionality of any statute or regulation. While Petitioners did raise the validity of the Window of Correction below and included that issue as a question presented to this Court in their Petition, they did not directly address its constitutionality. This is especially so in light of over two hundred (200) years of this Court's precedent holding statutes and regulations of the nature of the Window of Correction unconstitutional. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Gordon v. U.S.*, 117 U.S. 697 (1864); *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

6. The interest of the movant is threefold. Firstly, consistent with all members of the Bar, the movant wishes to preserve this Court's precedent of not issuing advisory opinions and preserving the case or controversy requirement of the United States Constitution. Secondly, the movant is presently representing clients who are before the Eleventh Circuit Court of Appeals concerning the meaning, interpretation and application of the Window of Correction Regulation. It is the interest of the movant and his clientele to assist this Court in considering all points of view, arguments and analyses as part of its rendering an opinion concerning the Window of Correction Regulation. Thirdly, the movant has an interest in preserving and protecting the rights of employees and

their right to representation by competent counsel in pursuing Fair Labor Standards Act claims. This is both a financial interest of the movant and a professional and ethical interest of the movant.

7. Interpretations afforded the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the Department of Labor Regulations thereunder concern many, if not all, of this country's working men and women. Cases such as this, may have a chilling effect upon their exercise of federally protected rights. 29 U.S.C. § 201 *et seq. Davis* will most assuredly have a chilling effect on FLSA civil enforcement actions. If the *Davis* decision stands all American workers will suffer. Enforcement of the FLSA will suffer. Workers, although armed with seemingly valuable rights under the Fair Labor Standards Act, will be hesitant to enforce those rights, and the availability of counsel to assist workers will be greatly diminished, if not totally dissipated. The Fair Labor Standards Act will, thus, be rendered nothing more than a statement of rights with no remedies. A dark day for all workers.

8. The movant has not and will not receive any compensation for costs or time expended in the preparation and filing of this Amicus Brief. No party to this action or their counsel prepared or assisted in the preparation of this brief.

WHEREFORE, the movant respectfully requests that this Honorable Court grant the movant leave to file his Brief in support of the Petition for Writ of Certiorari.

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STATEMENT OF MOVANT'S INTEREST

The interest of the movant is to preserve this Court's precedent of not issuing advisory opinions and preserving the case or controversy requirement of the United States Constitution and to safeguard the protection afforded American workers by the Fair Labor Standards Act.[1]

INTRODUCTION

The movant files this brief in support of the Petition for Writ of Certiorari to raise serious constitutional issues concerning the Department of Labor Window of Correction Regulation. These issues have heretofore not been raised by any party to this action and must be addressed prior to this Court's providing guidance or interpretation concerning that regulation.

SUMMARY OF ARGUMENT

The Window of Correction provision of the Department of Labor's interpretative regulations (hereinafter the "Window of Correction" or the "Regulation"), 29 C.F.R. § 541.118(a)(6), deprives the Federal Courts of their constitutional right to exercise the judicial power granted

[1] Petitioner has consented to the filing of this brief, Respondent has not. No part of this brief has been prepared or authored by counsel for a party and the movant has borne all costs and expenses of this brief.

pursuant to Article III § 2 of the United States Constitution. The Regulation accomplishes this by rendering decisions of Article III courts non-binding on *all* parties thereto depriving such courts of their inherent power to enforce and carry into effect their judgment.

The Regulation is an interpretation by the executive branch of government, the Secretary of Labor, delegating to a litigant, the party against whom a "judicial determination" has been made, the right and power to disregard that judicial determination. This right and power may be exercised at any time. *Auer v. Robbins*, 117 S.Ct. 905 (1997).

Allowing the party against whom an adverse "judicial determination" has been rendered to avoid that determination contravenes over 200 years of judicial precedent. As early as 1792 in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), this Court held that advisory and non-binding opinions were constitutionally prohibited. Thereafter, in *Gordon v. U.S.*, 117 U.S. 697, 702 (1864) and *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court invalidated an act of Congress reserving to the executive branch the power to disregard a judicial determination. In *Town of Deerfield v. FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993), a regulation reserving to an executive agency the power to disregard the judgment of an Article III Court was held unconstitutional.

This Court's decisions in *Hayburn's Case*, *Gordon*, and *Chicago & Southern*, and the Second Circuit's decision in *Town of Deerfield* require the Regulation be found unconstitutional as violative of Article III § 2 of the United States Constitution.

The interpretation afforded the Window of Correction by the lower courts has created unfair, inequitable and arbitrary and capricious results. *See, Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997); *Eugene v. McDonald's*, Case No. 96-2324-Civ-Highsmith, Order Denying Plaintiff's Motion for Award of Attorney's Fees and Reasonable Expenses dated January 22, 1998 (S.D. FL.) (hereinafter referred to as the "Eugene Order"); *Eugene v. McDonald's*, Case No. 96-2324-Civ-Highsmith, Final Order of Dismissal entered April 23, 1997 (hereafter the "Eugene Judgment").

ARGUMENT

I. THE ROLE OF THE JUDICIARY CANNOT BE ASSIGNED TO OTHERS

A. THE REGULATION

The Fair Labor Standards Act (hereinafter "FLSA") requires non-exempt employees be paid time and one-half for all hours worked in excess of forty per work week. 29 U.S.C. § 207. Although most employees are not exempt, the FLSA exempts, inter alia, executive, professional and administrative employees if paid on a "salary basis". 29 U.S.C. § 213; 29 C.F.R. § 541.118(a). It is, therefore, necessary to determine whether an employee performing executive, professional and/or administrative duties is paid on a "salary basis".

The Department of Labor has adopted regulations defining the term "salary basis". 29 C.F.R. § 541.118(a). This Court has held those regulations valid. *Auer*, 117

S.Ct. at 910. The "salary basis" regulations provide employees are paid on a "salary basis" only if their pay is not subject to reduction based on the quality or quantity of work. 29 C.F.R. § 541.118(a). An employee whose weekly pay is subject to reduction for disciplinary reasons is not paid on a salary basis, is not exempt as an executive, professional and/or administrative employee, and is entitled to overtime compensation. *Id.*; *Klein v. Rush Presbyterian – St. Lukes Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992).

In certain instances where an employee is determined not to be exempt solely because he or she is not paid on a "salary basis" the Department of Labor created the Window of Correction. The Window of Correction allows an employer to restore exempt status by repaying to the employee all impermissible deductions and promising to comply in the future. *Id.* The only circumstance in which an employer may use the Window of Correction is where an impermissible deduction occurs resulting in the loss of an otherwise applicable exemption.

An employer may invoke the Window of Correction at any time. *Auer*, 117 S.Ct. at 910. An employer may, therefore, fully litigate an employee's entitlement to overtime compensation in the trial and appellate courts prior to its use of the Window of Correction. *Id.* In the event the employer prevails at trial or on appeal, the Window of Correction is inapplicable because it only applies in those instances where exempt status is lost due to impermissible deductions. 29 C.F.R. § 541.118(a)(6). However, in the event the employee prevails, i.e., the employee is "judicially determined" not exempt and, therefore, entitled to

overtime compensation, the employer may then invoke the Window of Correction restoring the exemption and denying the employee overtime compensation. *Auer*, 117 S.Ct. at 910.

B. 206 YEARS OF PRECEDENT IGNORED

The Window of Correction as heretofore interpreted by this Court in *Auer* and the Eleventh Circuit Court of Appeals in *Davis* is both an unconstitutional exercise of and infringement upon the power of the judiciary by the executive branch of government, and at odds with the remedial purposes and intent of the statute it seeks to "interpret". *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792); *U.S. v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 42 (1852); *Gordon v. U.S.*, 117 U.S. 697, 702 (1864); *District of Colombia v. Eslin*, 183 U.S. 62, 65 (1901); *Muskrat v. U.S.*, 219 U.S. 346 (1911); *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Article III gives the judiciary " . . . the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that a judgment conclusively resolves the case because a judicial power is one to render dispositive judgments); *Town of Deerfield NY v. FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993).

This Court as well as many trial and appellate courts have recently had the opportunity to interpret the Regulation. *Auer*, 117 S.Ct. at 910; *Davis*, 120 F.3d at 1181; *Kuchinkas*, 840 F.Supp. 1548; *Eugene*, Case No. 96-2324-Civ-Highsmith (S.D. Fl. 1997). These interpretations focused far too narrowly on the precise wording of that regulation, while failing to address the important constitutional and social ramifications flowing from those interpretations.

This Court has unwaveringly held that a concrete and real case or controversy must exist prior to rendering a *judicial determination binding upon the parties thereto.* In *Gordon v. U.S.*, 117 U.S. 697, 704 (1864), Chief Justice Taney so eloquently stated:

> Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated – that is, that the Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

In *Gordon*, this Court held unconstitutional an act of Congress reserving to the Secretary of the Treasury the power to enforce a judicial determination stating:

> The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and

> without any operation upon the rights of the parties. . . . Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power the Court is allowed to exercise under this act of Congress. *Id.* at 702.

Issues relating to Article III of the Constitution, specifically the rendition of an opinion not final, conclusive and binding upon the parties, warrants an extensive constitutional analysis. *See, Gordon,* 117 U.S. 697 (1864). The subject Department of Labor Regulation, 29 C.F.R. § 541.118(a)(6), has yet to undergo such scrutiny. It is respectfully submitted that if this Court grants Certiorari the Window of Correction Regulation will not survive.

C. THE AGONY OF VICTORY AND THE THRILL OF DEFEAT.

The Regulation's infringement on the judicial power of Article III courts and the absurd, inequitable and arbitrary results flowing from current interpretations of that regulation is demonstrated by the following example. Mr. Smith sues Company X for overtime compensation alleging Company X made improper deductions from his and others weekly compensation in violation of the Department of Labor salary basis regulation (29 C.F.R. § 541.118). This is precisely the claim maintained by Messrs. Auer, Davis, Kuchinkas and Eugene.

Company X argues the salary basis regulation is invalid. Mr. Smith never worked more than forty hours per work week, and on and on. These defenses are quite

similar to those raised by the City of Hollywood, Mr. Robbins, Broward County, and McDonald's.

Company X loses in the District Court and is ordered to pay Mr. Smith $50,000.00 in overtime compensation, liquidated damages of $50,000.00 and Mr. Smith's attorney's fees and costs. 29 U.S.C. § 216(b). Mr. Smith is, thus, "judicially determined" non-exempt and entitled to overtime compensation.

Company X has two options. It may invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. In this event, despite the total absence of judicial intervention, the "judicial determination" of the district court that Mr. Smith is not exempt and accordingly entitled to overtime compensation becomes inoperative and nugatory (in the words of former Chief Justice Taney) leaving Mr. Smith without a remedy. Company X may unilaterally elect to ignore and disregard the "judicial determination" of the trial court and reimburse Mr. Smith for all disciplinary deductions from his pay, a two hour docking of $50.00. 29 C.F.R. § 541.118(a)(6). It's entirely up to Company X. *Auer*, 117 S.Ct. at 912; *Davis*, 120 F.3d at 1181. In the words of Judge Highsmith, if Company X invokes the Window of Correction it is to be " . . . treated, for all practical purposes, as if the alleged infraction never occurred." *Eugene*, Final Order at p. 2. How did the infraction never occur if the trial court made a "judicial determination" that it did, in fact, occur? The district court's "judicial determination" is nothing more than an advisory opinion. *Gordon*, 117 U.S. at 702.

The "judicial determination" of the trial court would certainly be binding on Mr. Smith had it ruled in Company X's favor. *See, Davis*, 120 F.3d 1178. Under these circumstances Company X would afford the "judicial determination" full and complete validity not subject to challenge other than by appeal. *Id.* The court, therefore, has the judicial power to bind the plaintiff, but not the defendant.

Company X may exercise its second option and appeal without invoking the Window of Correction. *Auer*, 117 S.Ct. at 912. A panel of appellate judges would then review the trial court's "judicial determination" that Mr. Smith is not exempt and, therefore, entitled to overtime compensation.

If the district court's "judicial determination" is affirmed, Company X would then be faced with the same two choices it had before appeal. Company X could invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. In this event both the "judicial determination" of the district court and appellate court that Mr. Smith is not exempt and, therefore, entitled to overtime compensation would be rendered inoperative and nugatory (in the words of former Chief Justice Taney) at the option of Company X. In the words of Judge Highsmith, "the alleged infraction never occurred" despite the trial and appellate courts findings to the contrary. *See, Gordon*, 117 U.S. at 702; *Chicago & Southern*, 333 U.S. at 113; *Town of Deerfield*, 922 F.2d at 427-29. Company X could pay Mr. Smith the $50.00 deducted from his pay, not the judgment awarded by the district court and affirmed on appeal. 29 C.F.R. § 541.118 (a)(6). The appellate court has, thus, not

made a "judicial determination" at all, but has rendered a non-binding advisory opinion to Company X. *Id.*

To add insult to injury, this Court may very well be brought into the fray. *Auer*, 117 S.Ct. at 912. If this Court grants Certiorari and affirms the "judicial determination" of the district and appellate courts that Mr. Smith is not exempt and, therefore, entitled to overtime compensation and his attorney's fees and costs, Company X has two options. The first is to pay Mr. Smith the $100,000.00 the district court, the appellate court and this Court "judicially determined" due and owing (as well as his attorney's fees and costs). The second is to invoke the Window of Correction. *Auer*, 117 S.Ct. at 912. Company X must now finally decide what to do. Does it ignore the "judicial determination" of the highest court of the land?

In whose favor has judgment been rendered? One could reasonably conclude that Mr. Smith did fairly well in his excursion through the federal court system. The trial court made a "judicial determination" that he was not exempt and entitled to overtime compensation. The appellate panel and this Court unanimously affirmed the trial court's decision. If Company X invokes the Window of Correction it appears Mr. Smith pitched a perfect game and, amazingly, lost.

D. *DAVIS* ADDS INSULT TO INJURY-WINNERS WEEPERS-LOSERS KEEPERS

To the well trained eye in the Eleventh Circuit Mr. Smith has not fared well. *Id.* He accomplished nothing despite his apparent success. The "alleged infraction" he

complained of "never occurred" notwithstanding the judicial determinations to the contrary by the trial and appellate courts. *See, Eugene,* Final Order at p. 2. Even though Company X has not heretofore been bound by any "judicial determination" in this case, 29 C.F.R. § 541.118(a)(6), Company X will move the trial court for recovery of its costs pursuant to Rule 54 of the Federal Rules of Civil Procedure. *Davis,* 120 F.3d at 1181. The trial court is bound to do so by the precedent in its circuit. *Id.* That's ironic, Company X using the judicial system to bind Mr. Smith by an exercise of "judicial power"!

Company X will seek the modest sum of $100,000.00 in costs for Mr. Smith's relentless application of the FLSA to it. Should Mr. Smith, the individual protected by the FLSA, be responsible for Company X's costs of defending an illegal pay policy? The Eleventh Circuit says so. *Id.*

E. THE MESSENGERS ARE NOW DEAD, BUT NOT FORGOTTEN

The more Mr. Smith wins, the more he pays! Mr. Smith should know better than attempting to utilize the FLSA to benefit others similarly situated to him who may be unaware of the violation of their legal rights. *See, Hoffmann-La Roche v. Sperling,* 493 U.S. 165 (1989); 29 U.S.C. § 216(b). This is why Mr. Smith must be forced to pay all the costs of Company X in this litigation while those similarly situated to him who benefitted from Company X's use of the Window of Correction must incur no such liability. *Davis,* 120 F.3d at 1181; *See,* 29 C.F.R. § 541.118(a)(6).

The message will be sent to all other Mr. Smiths that an overtime claim under the FLSA is certainly not a claim that should ever be raised. *See*, 29 U.S.C. § 202. If someone else raises the claim, one stands to benefit while the instigator suffers financial ruin. *Davis*, 120 F.3d at 1181. In ancient Rome they killed the messenger, didn't they?

F. THE LAWYERS – WHERE HAVE THEY GONE

As difficult as it may be to believe the plight of Mr. Smith, Mr. L, his counsel, has been placed in an equally untenable position. It was, after all, Mr. L who agreed to represent Mr. Smith and others similarly situated to him on a contingent fee basis expending hundreds of thousands of dollars in attorney's time and costs. Mr. L cannot rely on Mr. Smith for payment, especially in light of Mr. Smith's obligation to pay Company X's costs. *Davis*, 120 F.3d at 1181.

Is Mr. L entitled to recover attorney's fees and costs from Company X by his securing judgment in favor of Mr. Smith at trial, and having such judgment affirmed on appeal? 29 U.S.C. § 216(b); *see*, *Davis*, 120 F.3d at 1181; *Eugene*, Order; *Eugene*, Final Judgment. I think not. The reason: Company X used the Window of Correction so Mr. Smith was always exempt and not entitled to overtime compensation. *Id*. This is the case despite the trial and appellate court's "judicial determination" to the contrary.

Denying Mr. L the right to recover his attorney's fees and costs deprives FLSA claimants of the opportunity to be represented by skilled and competent counsel. *See*,

Fegley v. Higgins, 19 F.3d 1126, 1134-35 (6th Cir. 1994), *cert. den.*, 513 U.S. 875 (1994). In *Fegley*, the Sixth Circuit Court of Appeals held:

> The purpose of the FLSA attorney's fees provision is "to ensure effective access to the judicial process by providing attorney's fees for prevailing plaintiffs with wage and hour grievances". [citation omitted]. The Court should not place an undue emphasis on the amount of the plaintiff's recovery because an award of attorney's fees here encourages the vindication of congressionally identified policies and rights. *Id.*

Denying Messrs. Smith, Davis, Kuchinkas and Eugene the right to recover their attorney's fees and costs (and assessing Company X's costs against Messrs. Smith and Davis) contravenes the purpose and intent of the FLSA and its attorney's fee provision. 29 U.S.C. § 216(b). The Legislative History of the FLSA fully supports Messrs. Smith, Davis, Kuchinkas and Eugene's right to recover attorney's fees and costs wherein it states:

> Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new issues. If this shall occur violations of either the wages or hours, the employees can themselves . . . maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment *and shall also allow a reasonable attorney's fee and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It*

is both a common-sense and economical method of regulation. [Emphasis Supplied]. 83 Cong. Rec. 9264.

G. THE INFRACTION IS NOT MERELY ALLEGED – IT DID OCCUR

The state of the law cannot be as interpreted by the Eleventh Circuit Court of Appeals in *Davis*, Judge Highsmith in *Eugene* and Judge Ungaro-Benages in *Kuchinkas*. These unfortunate decisions emanate from the misapplication of an unconstitutional Department of Labor Regulation and evolve into a convoluted pattern of turning the law against those it was designed to protect.

The Regulation cannot serve as the basis for finding a violation that has been "judicially determined" to have occurred, did not occur. If an Article III court finds an employee not exempt and entitled to overtime compensation, the employee is not exempt and, therefore, is entitled to overtime compensation regardless of the "interpretation" of the Department of Labor or the actions of the party against whom that determination has been made. *Gordon*, 117 U.S. 697 (1865). There is simply no basis, constitutional or otherwise, for allowing the defendant to disregard that determination.

Sadly, the Department of Labor, the entity charged with protecting the rights of workers, is the architect of this convoluted concept. Logic and reason must be returned to this area of the law. *See, Dunlop v. Ashy*, 555 F.2d 1225, 1234 (5th Cir. 1977).

The absurdity and inequity of the Regulation can only be remedied by a definitive pronouncement by this

Court. That pronouncement must either find the Window of Correction invalid in its entirety, which the movant believes to be the case, or, if this Court finds the Window of Correction valid, this Court must inform all lower courts that the invocation of the Window of Correction results in the employee being a prevailing party entitled to recover attorney's fees and costs, that under no circumstances shall a party invoking the Window of Correction be entitled to recover costs pursuant to Federal Rule of Civil Procedure 54, and that the party invoking the Window of Correction must be compelled by a binding "judicial determination" to comply with each and every requirement of that provision with the court retaining jurisdiction to monitor and enforce that "judicial determination".

CONCLUSION

This Court has held that Congress cannot pass legislation reserving to itself the right to avoid the effect of a judicial determination. Similarly, this Court has held that Congress cannot enact legislation reserving to the executive branch of government the power to alter a judicial determination. Similarly, the Second Circuit Court of Appeals has held that the executive branch cannot by regulation reserve for itself the power to alter a judicial determination. It is, therefore, well established that acts of Congress and regulations of a department of the executive branch of government that allow the alteration of a judicial determination are unconstitutional. For this reason, the Window of Correction provision of the Department of Labor Regulations, 29 U.S.C. § 541.118(a)(6), is

unconstitutional. If the Department of Labor is prohibited from issuing a regulation reserving to itself the power to reverse a judicial determination, the Department of Labor certainly cannot delegate such power to another, much less the party adversely affected by that purported "judicial determination".

No meaningful distinction exists between the constitutionality of the Window of Correction Regulation and the laws and regulations heretofore invalidated by this Court. In fact, the Window of Correction Regulation poses more serious constitutional and regulatory concerns than those heretofore considered in *Hayburn's Case, Gordon, Chicago & Southern;* and *Town of Deerfield.* In the case sub judice the power to avoid a "judicial determination" arises via interpretative regulation promulgated by an executive agency of government (Department of Labor), not an Act of Congress. In *Hayburn's Case, Gordon* and *Chicago & Southern,* the power to avoid the judicial determination arose out of an "Act of Congress". To exacerbate the situation, in the case sub judice the power to avoid the "judicial determination" was not retained by the executive agency (Department of Labor) or by Congress, but was delegated to a litigant in the "adversary" proceedings against whom the "judicial determination" was made. The creation of a mechanism for the avoidance of a "judicial determination" by a department of the executive branch of government and the delegation of that power to the litigant against whom judgment has been entered presents a far more compelling argument for invalidation than any heretofore considered by this

Court. Has the Department of Labor not given the fox the keys to the hen house?

Respectfully submitted,

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